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FCC Record

A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

***James H. Quello, Chairman**

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***Commissioner Quello designated as Chairman effective February 5, 1993.**

****Commissioner Marshall resigned effective April 30, 1993.**

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ALLNET COMMUNICATION
SERVICES, INC.,
Complainant,

v. File No. E-89-38

U S WEST, INC.,
Defendant.

MEMORANDUM OPINION AND ORDER

Adopted: March 24, 1993; Released: May 4, 1993

By the Commission:

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I. INTRODUCTION

1. Allnet Communication Services, Inc. (Allnet) filed a formal complaint against US West, Inc. (USWC) and its operating subsidiaries Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company.[1] (defendants) on November 2, 1988, alleging that the defendants violated Section 201(b) of the Communications Act (the Act)[2] by violating the Commission's rate of return prescription for the period October 1, 1985 through December 31, 1986. The complaint also alleges that defendants are in violation of Section 202(a) of the Act[3] in failing to provide dial-1 intraLATA interstate equal access to Allnet. Finally, Allnet alleges that the defendants assessed a late payment charge which was unjust and unreasonable during the period November 1986 through October 1989. For the reasons discussed below, we grant Allnet's complaint in part and deny it in part to the extent discussed below.

II. RATE OF RETURN ISSUES

A. Background

2. The Commission has previously held that local exchange carriers (LECs) who had earned in excess of the prescribed rate of return for October 1, 1985 through December 31, 1986 violated Section 201(b) of the Act.[4] These decisions establish that carrier rates that produce earnings in excess of the Commission's prescribed rate of return violate Section 201(b) of the Act[5] and allegations of such overearnings are sufficient to sustain a cause of action under Section 208 of the Act. Furthermore, the Commission has held that complainants may recover damages, including interest, from LECs who violated the Commission's rate of return prescription.[6]

3. While a detailed accounting of the applicable statutory scheme and relevant Commission and court decisions that preceded the filing of the captioned complaint is set forth in the *MCI Liability Order*[7] and will not be repeated here, a brief review of the relevant rate of return prescription is

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[1] Northwestern Bell Telephone Company (NWB), Mountain States Telephone and Telegraph Company (MTN), and Pacific Northwest Bell Telephone Company (PNB) have consolidated. *See* 5 FCC Rcd 1982 (1990). U S West (USWC) is the remaining company. At the time the subject complaint was filed, NWB, MTN, and PNB were wholly-owned subsidiaries of USWC. For purposes of this proceeding, USWC has filed responsive pleadings on behalf of NWB, MTN, and PNB.

[2] 47 U.S.C. § 201(b).

[3] 47 U.S.C. § 202(a).

[4] MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co., *et al.*, 5 FCC Rcd 216 (1990) (*MCI Liability Order*), *recon. denied*, 5 FCC Rcd 3463 (1990) (*MCI Reconsideration Order*) (jointly "*MCI Orders*"), *appeal dismissed sub nom. Mountain States Tel. and Tel. Co., et al. v. FCC*, 951 F.2d 1259 (10th Cir. 1991) (per curiam); and American Telephone and Telegraph Co. v. Northwestern Bell Telephone Co., 5 FCC Rcd 143 (1990), *appeal dismissed sub nom. Mountain States Tel. and Tel. Co., et al. v. FCC*, 951 F.2d 1259 (10th Cir. 1991) (per curiam).

[5] Section 201(b) provides, in pertinent part, that "[a]ll charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful."

[6] MCI Telecommunications Corporation v. Pacific Bell Telephone Company, *et al.*, FCC 93-70 (released Feb. 8, 1993) (*MCI Damages Order*).

[7] *MCI Liability Order*, 5 FCC Rcd at 217-18.

helpful. The Commission prescribed a rate of return of 12.75 percent for the initial monitoring period of October 1, 1985 through December 31, 1986.[8] Because the initial review period would be 15 months rather than two years as adopted in subsequent periods, the Commission expanded the "buffer"[9] that would be used during this initial monitoring period to determine whether the prescription had been violated.[10] Carriers were given notice that a 13.10 percent level of earnings would be the maximum allowable rate of return on overall interstate earnings and 13.25 percent would be the maximum allowable return for any access service category.[11]

4. In November 1988, Allnet filed the subject formal complaint against the defendants alleging violations of the Commission's rate of return prescription. In addition, Allnet reserved the right to file a supplemental complaint for damages as provided for in Section 1.722 of the Commission's rules[12] because it could not determine the precise amount of damages it suffered at the time its complaint was filed. The defendants filed an answer and motion to dismiss. On June 9, 1992, the Common Carrier Bureau (Bureau) released an order establishing discovery and briefing schedules.[13] Pursuant to the *Discovery Order,* the parties submitted their initial briefs and reply briefs setting forth their respective claims and arguments.[14]

B. Discussion

1. Liability fo Damages

a. Contentions of the Parties

5. Allnet alleges that the rates it paid for certain of the defendants' interstate access services during the period from October 1, 1985 through December 31, 1986 were unjust and unreasonable in violation of Section 201(b) of the Act. Allnet supports its allegations with evidence taken from reports filed with the Commission by the defendants for the 15-month period at issue that show that defendants achieved earnings in excess of the Commission's prescribed rate of return on one or more of the three interstate access categories established for the purpose of enforcing that rate of return prescription.[15]

6. Allnet requests that the Commission declare that the defendants' charges for the period from October 1, 1985 through December 31, 1986 are in violation of the rate of return prescription and Section 201(b) of the Act, and order the defendants to pay damages to Allnet equal to the difference between the amount actually paid by Allnet for interstate access service during the period and the amount that Allnet would have paid if the defendants' charges earned no more than the maximum allowable rate of return, plus interest.

7. The defendants raise a number of issues that have been fully considered by the Commission in the *MCI Orders.* They will be briefly discussed below.

8. Defendants advance a variety of arguments to support their claim that Allnet has failed to state a cause of action under the Act. Primarily, the defendants argue that Allnet's

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[8] *See* Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985) (*Phase I Order), on reconsideration,* Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,103 (Apr. 1, 1986) (*Phase I Reconsideration), on further reconsideration,* 2 FCC Rcd 190 (1987), *See also* Procedures and Methodologies to Establish Reporting Requirements, CC Docket No. 86-127, FCC 86-514 (released Dec. 3, 1986), 52 Fed. Reg. 273 (Jan. 5, 1987).

[9] *See MCI Liability Order,* 5 FCC Rcd at 217:

> ... the Commission established both an authorized rate of return and a 'spread' or 'buffer' above that return for use in proceedings relating to the enforcement of the prescription. In other words, the authorized return would be employed in computing tariff rates; the spread, or buffer, would be used in combination with the authorized return 'to determine whether a rate of return prescription had been violated.' [footnote omitted.]

[10] *Phase I Order,* 50 Fed. Reg. at 41,352 (para. 21).

[11] 47 C.F.R. § 65.701(b).

[12] 47 C.F.R. § 1.722.

[13] Allnet v. U S West, Inc., 7 FCC Rcd 3775 (Com. Car. Bur. 1992) (*Discovery Order).* Allnet had pending interrogatories and a motion to compel responses to the interrogatories. The defendants filed interrogatories on Allnet on June 25, 1992. Allnet filed additional discovery requests on June 26, 1992. The defendants filed responses to Allnet's discovery requests. The parties filed briefs (USWC Br.) on August 5, 1992 with a corrected initial brief filed by Allnet (Allnet Br.) on August 7, 1992. The defendants filed a reply brief (USWC RBr.) on August 20, 1992, and Allnet filed its reply brief (Allnet RBr.) on August 21, 1992. On August 24, 1992, the defendants filed an erratum to their July 16, 1992 response to Allnet's interrogatories.

[14] As a preliminary matter, we note that USWC has stated that it filed its brief directly with the Commission because it could find no order delegating damages authority to the Bureau. In addition, USWC formally objects if the Bureau is deciding these cases under delegated authority because it contends that the Bureau has been performing investigative and prosecutorial functions in these proceedings and cannot, under Section 554(d) of the Administrative Procedure Act (5 U.S.C. § 554(d)), act as decision maker herein. USWC Br. at 2, n.7. While we agree with USWC that the damages issue must be decided by the Commission, 47 U.S.C. § 155(c)(1), the Bureau may deal with interlocutory matters such as discovery issues. We also disagree with USWC's characterization of the Bureau's activities regarding these complaint proceedings. The Bureau has at all times been acting as the "decision maker" and not as an "investigator" or "prosecutor."

[15] The interstate access service categories are special access, common line, and switched traffic sensitive. *See* 47 C.F.R. § 65.702. Allnet states that the monitoring reports recite that for the period October 1, 1985 through December 31, 1986: MTN earned in the switched access category returns of 14.60% in Arizona, 13.19% in Colorado, 15.20% in Montana, 14.97 % in New Mexico, 13.67% in Utah, and 14.93% in Wyoming; PNB earned in the switched access category returns of 14.76% in Oregon, and in the special access category returns of 15.09% in Idaho and 13.01% in Washington; NWB earned in the switched access category returns of 14.64% in Iowa, 14.33% in Minnesota, 15.79% in Nebraska, and 19.71% in North Dakota; and in the special access category earned returns of 14.31% in Iowa, 13.85% in Minnesota, 13.63% in Nebraska, and 16.01% in North Dakota.

claims are barred by *American Telephone and Telegraph v. FCC*.[16] The defendants contend that renaming a "refund" as a "damage award" does not cure the inconsistencies the court found with respect to the automatic refund rule and allow the awarding of damages in the instant complaint.[17] According to the defendants, it is contrary to *AT&T v. FCC* to find a rate of return violation when overall earnings for interstate access service did not exceed 13.10 percent regardless of access category earnings in excess of 13.25 percent.[18]

9. The defendants also argue that the Commission is engaging in retroactive ratemaking should it order a carrier to make refunds solely because the carrier has exceeded the authorized rate of return.[19] According to the defendants, rates charged in conformity with a lawfully filed tariff applied in a non-discriminatory manner cannot then be found to be unjust andunreasonable.[20] Finally, the defendants also argue that a portion of Allnet's claims are barred by Section 415 of the Act,[21] which establishes a two-year statute of limitations on the filing of complaints.[22]

b. Discussion

10. We have carefully examined the record before us and conclude that the defendants, who were defendants in the MCI complaint proceedings, have cited no facts and have made no arguments here that would warrant a ruling contrary to the *MCI Orders*.

11. *Failure to State a Cause of Action:* In the *MCI Liability Order*, we rejected identical claims made by the same defendants and held that *AT&T v. FCC* establishes no precedent that bars an individual complainant from seeking a remedy under Section 208 of the Act for damages based on a carrier's reported overearnings.[23] We stated that

> we are not persuaded by the defendants' claims that earning in excess of a prescribed rate of return does not violate that Act or, if it does, that the Commission *is required* to take a carrier's underearnings as well as its overearnings into account in determining whether a violation has occurred.
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> * * * * * * *
>
> We find that a valid prescription bound the defendants to a maximum earnings limitation, and the defendants admit that they earned in excess of that amount during the period in question.[24]

We found further that *AT&T v. FCC* did not pertain to Section 208 complaint proceedings. The Commission has the authority to order a carrier to pay damages if a complainant meets the burden of establishing both a violation of the Act and the actual injury.[25]

12. *Retroactive Ratemaking:* In addition, we have previously held that enforcement of a rate of return prescription is not retroactive ratemaking because the obligation being enforced was set prospectively when the prescription was adopted.[26] Defendants have not persuaded us to alter our decision. We have also rejected the contention that rates charged in conformity with a lawfully filed tariff cannot be unjust and unreasonable.[27] Accordingly, we hold that, taking into account the buffer, earnings in excess of a prescription are unjust and unreasonable.

13. *Statute of Limitations:* Allnet is correct in its assertion that it had until September 30, 1989 to file its complaint based on monitoring reports filed by defendants with the Commission on September 30, 1987. We have previously held that the date of the filing of the final monitoring report is dispositive with regard to the date a complainant discovers the right or wrong or the facts on which such knowledge is chargeable as a matter of law.[28] Defendants have made no argument that persuades us to alter this holding. Section 415 does not bar Allnet's complaint.

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[16] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*). The court invalidated the Commission's procedure to enforce its rate of return prescriptions through automatic refunds of carrier overearnings to customers. For a detailed discussion of *AT&T v. FCC*, *see MCI Liability Order*, 5 FCC Rcd at 221-23. The Court of Appeals for the Sixth Circuit, relying on *AT&T v. FCC*, vacated a Commission order that dealt with refunds of earnings in excess of the authorized rate of return for the special access category over a period of years in the context of a strategic pricing investigation. *See Ohio Bell v. FCC*, 949 F.2d 864 (6th Cir. 1991) (*Ohio Bell*). The court primarily relied upon the statement from *AT&T v. FCC* that a rate of return prescription is both a minimum and a maximum prescription. *See AT&T v. FCC*, 836 F.2d at 1390. The Commission has clarified, however, that it does not view a rate of return prescription as both a maximum and a minimum and has stated that

> [o]ur accumulated experience with rate of return prescriptions, and our review of the cost of capital evidence in this proceeding, convince us that there is no such point. * * * We believe there is a substantial gap between an earnings level that is fully adequate to assure attraction of capital on favorable terms, and an earnings level which, if sustained over time, would be confiscatory.
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> Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, 5 FCC Rcd 7507, 7532 (1990), *appeal docketed sub nom. Illinois Bell Telephone Co., et al. v. FCC*, No. 90-1020 (D.C. Cir. Jan.11, 1991).

[17] USWC Br. at 7-8.

[18] USWC Answer at para. 23.

[19] USWC Br. at 6.

[20] USWC Answer at para. 23.7

[21] Section 415 provides, in pertinent part, that "[a]ll complaints against carriers for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after...." 47 U.S.C. § 415(b) (1982). The term "overcharges" is defined in Section 415 "to mean charges for services in excess of those applicable thereto under the schedules of charges lawfully on file with the Commission." 47 U.S.C. § 415(g) (1982).

[22] In reply to this argument, Allnet asserts that the statute of limitations did not begin to run prior to September 30, 1987 when the defendants filed their earnings for the review period. Allnet Reply at 31.

[23] *MCI Liability Order*, 5 FCC Rcd at 222-23.

[24] *MCI Liability Order*, 5 FCC Rcd at 223 (emphasis in the original) [footnote omitted].

[25] *Id.*

[26] *Id.* at 222.

[27] *Id.*

[28] In the *MCI Liability Order* we stated:

C. Damages and Interest Claims

1. Damages

14. Allnet's damages claims rest primarily on the contention that the proper measure of damages it incurred as a result of the defendants' rate of return prescription violations is the difference between the amount it actually paid the defendants for interstate access services during the October 1, 1985 through December 31, 1986 monitoring period and the amount it would have paid if the defendants' rates produced earnings that did not exceed the Commission's prescription. The defendants, however, have raised a number of challenges to Allnet's damages claims, including a number of arguments that were previously considered and rejected by the Commission in the *MCI Liability Order* and the *MCI Damages Order*. We address the parties' contentions below.

a. Contentions of the Parties

15. As referenced above, Allnet's damages claims rest primarily on the contention that the proper measure of the damages it incurred as a result of defendants' violations is the difference between the amount it actually paid defendants for interstate access services during the October 1, 1985 through December 31, 1986 period and the amount it would have paid if the defendants' rates had produced earnings that did not exceed the Commission's prescribed rate of return. In the *Discovery Order*, the Bureau stated that it tended to agree, in principle, that a possible measure of the damages stemming from defendants' rate of return violations could be the difference between the amount it actually paid the defendants for interstate access services during the October 1, 1985 through December 31, 1986 monitoring period and the amount it would have paid if the defendants' rates produced earnings that did not exceed the Commission's prescription.[29] The Bureau was not persuaded on the record before it, however, that a damages determination based solely on such a measure necessarily reflected actual damages incurred by Allnet.[30] The defendants were invited to submit evidence that could serve to mitigate or otherwise reduce Allnet damages claims. Specifically, the Bureau stated that evidence demonstrating that Allnet's share of excessive earnings realized in a particular access category by a defendant could be offset or otherwise reduced due to facts and circumstances surrounding Allnet's purchase of other interstate access services from such defendant for the relevant monitoring period might be relevant.[31]

16. Under its approach to calculating damages, Allnet states that it should be awarded damages in the amount of $627,000 from the defendants, including interest. Allnet states that the data underlying these calculations were taken from the defendants' Forms 492, responses to discovery and other filings in these proceedings as well as Commission orders in tariff proceedings.[32] Although Allnet does not specifically describe its method in computing its damages, it does provide a chart providing its figures and its conclusions. To derive the stated amounts, Allnet first calculates for each access service category, the amount that defendants' earnings exceeded the rate of return prescription of 12.75% plus the .50% buffer. This was accomplished by multiplying the defendants' rate base by the difference between the defendants' actual rate of return (from the defendants FCC Forms 492) and the maximum allowable rate of return (including the .50% buffer) and then multiplying by .8 (which represents the cumulative measurement periods). Next, Allnet computes its percentage share of the defendants' revenues for each access service category by dividing the amount billed per category to Allnet by defendants' revenues per access category.[33] Using this percentage, Allnet then computes its monetary share of the overearnings in a particular access category by multiplying Allnet's percentage of the revenues by the amount of overearnings for that category. Allnet also adds to this amount the defendants' tax rate for the period at issue and a 15% "cost of money" charge in place of the actual interest rate for the monitoring period.[34] Thus, Allnet contends that it is owed $627,000.

17. The defendants challenge Allnet's damages claims on a number of grounds, raising several arguments that were previously considered and rejected by the Commission in the *MCI Liability Order* and the *MCI Damages Order*. Defendants contend that by simply basing its damages claims on a calculation of Allnet's prorated share of category-level overearnings, Allnet asks the Commission to award it damages in the same amounts it would have received under the automatic refund rule invalidated by the court in *AT&T v. FCC*.[35] The defendants maintain that such a result is expressly precluded by *AT&T v. FCC*. The defendants add that the decision in *Ohio Bell* precludes an award of damages based solely on category level overearnings.

18. Defendants next contend that, even if *AT&T v. FCC* and *Ohio Bell* do not preclude Allnet's damages claims, the claims still fail because Allnet's complaint does not establish a valid cause of action. According to defendants, to pursue a damages claim, Allnet must first show that the defendants charged unjust and unreasonable rates for inter-

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> the defendants filed the rate of return monitoring reports which... were developed by the Commission for several purposes, including making information about carrier earnings public[ly] available. Moreover, the monitoring reports relied on by MCI in its complaints were specifically designated by the Commission as a "final" and conclusively binding determination of a carrier's earnings.

5 FCC Rcd at 225. We note further that, we have held that Section 415(e) is inapplicable to the type of complaints we deal with here. Section 415(e) concerns a carrier's liability to its customers for failure to transmit a message in accordance with its common carrier obligations. The instant complaints deal with the lawfulness of defendants' rates, not defendants' transmissions or obligations to transmit messages properly. *See MCI Reconsideration Order*, 5 FCC Rcd at 3464.

[29] *Discovery Order*, 7 FCC Rcd at 3775, para. 8.

[30] *Id.*

[31] *Id.*

[32] Allnet Br. at 2-3.

[33] Allnet refers to USWC Responses to Interrogatories, Attachment C, which indicates that Allnet's market share was 0.72%.

[34] Allnet claims this cost of money charge because of the loss of the use of the overearned portion retained by the defendants. Allnet states that for every dollar of overcharges, Allnet had to borrow money at 15% per year to continue to operate its business. Allnet Br. at 3.

[35] USWC Br. at 4-6.

state access services during the period in question, not that defendants' rates produced excessive returns in individual service categories.[36] Defendants maintain that by simply referencing defendants' earned rates of return for individual access service categories, Allnet has not only failed to allege any facts that would establish that defendants' rates were unjust and unreasonable during the period in question but has also failed to show that it sustained actual damage as a result of those rates.[37]

19. The defendants also raise arguments to support their claims that an award of damages to Allnet based on carrier overearnings is inappropriate for equitable and policy reasons. Defendants vigorously argue that Allnet is actually seeking restitution or a refund of tariffed charges, not damages. According to the defendants, *Illinois Bell Telephone Co. v. FCC*[38] reemphasizes that refunds can only be awarded in cases where the rates in question have been suspended pursuant to Section 204 of the Act. Defendants argue that regardless of how Allnet characterizes the relief it seeks, any form of refund or restitution to Allnet would be contrary to the public interest.[39] Defendants contend that an award of damages would be inequitable because their total corporate rate of return would be driven below the confiscatory level. According to the defendants, *Ohio Bell* reaffirms the proposition established in *AT&T v. FCC* that the Commission cannot have a rate of return refund structure which would operate to deprive carriers of the opportunity to earn the minimum necessary to attract capital.[40] Defendants further contend that an award of damages would be inequitable because there was uncertainty surrounding the tariff filings during the relevant period and Allnet would receive a windfall that would be inconsistent with sound equitable principles.[41]

20. Allnet counters that the defendants reiterate arguments that have been largely rejected by the *MCI Liability Order*. Allnet contends that defendants' argument that a 12.75% return on the overall earnings at the holding company level is the proper measure of damages, contradicts its decision to operate and file tariffs as three separate companies during the 1985-1986 monitoring period.[42] Allnet refutes defendants' contention that a Section 204 suspension and investigation are prerequisites to reparations for unreasonable rates, arguing that the Act specifically provides for refunds for damages due to violations of a rate of return prescription. Allnet also denies that it would receive a windfall because it would be justly reimbursed for the high access charges it was assessed during the relevant monitoring period. Allnet maintains that it has shown that defendants charged it rates that produced earnings in excess of the Commission's prescribed rate of return and argues that its damages are the excessive charges that Allnet paid.[43]

21. Allnet also argues that the defendants have failed to carry their burden of proving offsets with regard to Allnet. Allnet contends that defendants did not provide data illustrating that Allnet purchased in underearning categories.[44] Thus, Allnet maintains that defendants must pay Allnet for damages for full category level overearnings.

b. Discussion

22. *AT&T v. FCC and Ohio Bell:* The defendants' claims that the holding in *AT&T v. FCC* and *Ohio Bell* control these proceedings and bar an award of damages to Allnet are without merit for the reasons stated in both the *MCI Liability Order* and the *MCI Damages Order*. In the liability section above, we again emphasized that the court in *AT&T v. FCC* explicitly acknowledged the Commission's authority to order a carrier to disgorge earnings in excess of a rate of return prescription,[45] finding only the remedy component of the Commission's rate of return prescription

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[36] USWC argues that Allnet must specify an identifiable rate that it paid that was too high or too low. USWC Br. at 11. In addition, USWC cites to a 1970 circuit court decision to support its claim that where retroactive relief is ordered for rates paid pursuant to a tariff that is subsequently found unjust and unreasonable, the Commission must determine what a just and reasonable rate is. *Id.*, citing to *Middlewest Motor Freight Bureau v. United States*, 433 F.2d 212, 232 (8th Cir. 1970) (*Middlewest*), *cert. denied*, 402 U.S. 999 (1971). As we determined in the *MCI Damages Order*, USWC's reliance on *Middlewest* is misplaced. *MCI Damages Order* at n.56.

[37] *See, e.g.*, USWC Br. at 12. USWC contends that the principle that Allnet must still prove it was damaged and in what amount was established by the Supreme Court in *Southern Ry. Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 454-55 (1979) (*Seaboard*), in construing relevant sections of the Interstate Commerce Act. The Court stated:

> [O]ur sole concern is the Commission's decision not to investigate under § 15(8)(a) [204], a decision that has only two final consequences. First, the burden of proof with regard to *reasonableness* is placed on the shipper under § 13(1) [208] rather than on the carrier, who would have borne it in a § 15(8)(a) [204] proceeding. (With respect to all other aspects of lawfulness, however, the burden is borne by the shipper in both proceedings.) Second, the shipper's relief, if unlawfulness is proved, is limited under § 13(1) [208] to actual damages rather than the full refund of overcharges available under § 15(8)(a) [204].

USWC states that this ruling has been found applicable to proceedings under the Communications Act. *See Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221, 1235 n.35 (D.C. Cir. 1980) (*ARINC*), *cert. denied*, 451 U.S. 920 (1981). Here too, as we determined in the *MCI Damages Order*, USWC's reliance on case precedent is misplaced. *MCI Damages Order* at n.59.

[38] *Illinois Bell Telephone Co. v. FCC*, 966 F.2d 1478 (D.C. Cir. 1992) (*Illinois Bell*).

[39] USWC Br. at 13-19. USWC argues Allnet must plead its case in equity and the Commission may only award a refund/damages if we find that the public interest will be served by a refund/damages award to Allnet. USWC contends that the leading case in this area is *Moss v. Civil Aeronautics Board*, 521 F.2d 298 (D.C. Cir. 1975) (*Moss*), *cert. denied sub nom. Roberts v. Civil Aeronautics Board*, 424 U.S. 966 (1976), *reh'g denied*, 425 U.S. 966 (1976). USWC states that the refund in *Moss* "was governed by the equitable principles governing the law of restitution." USWC Br. at 14, citing to *Moss*, 521 F.2d at 304. We addressed this argument in the *MCI Damages Order* and found USWC's reliance on *Moss* to be misplaced.

[40] USWC Br. at 10.

[41] USWC Br. at 17-19.

[42] Allnet RBr. at 3.

[43] *Id.* at 6.

[44] *Id.* at 3.

[45] *AT&T v. FCC*, 836 F.2d at 1392 ("Thus, as we previously have concluded, the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate of return prescription.").

(the automatic refund mechanism) to be unlawful.[46] More to the point, we emphasized that "the [*AT&T v. FCC*] opinion does not address Section 208 complaint proceedings nor purport to alter the statutory scheme of the Act or the remedies Congress established therein."[47] Similarly, as we stated in the *MCI Damages Order,* the *Ohio Bell* decision does not expand upon *AT&T v. FCC* and does not address the Commission's authority to award damages in private complaint actions under Section 208 of the Act.[48]

23. We also reject defendants' claim that the decision in *Illinois Bell* somehow leaves the Commission only with Section 205 authority in the face of a violation of our rate of return prescription. In *Illinois Bell,* the court found that the Commission had ordered a refund under Section 204(a) of the Act without having issued a suspension order. The sole issue presented for resolution by the court was the difference in interpretation by the Commission and the petitioning parties of the Commission's authority under Section 204.[49] The court did not address individual complaint remedies, but merely held that the Commission is not authorized to order refunds under Section 204 without having issued a suspension order, and that in doing so it must have acted under Section 205, which provides for prospective relief only.[50]

24. *Damages and Offsets:* The defendants' arguments are devoted primarily to attempting to persuade the Commission that Allnet's damages claims are really claims for restitution or refunds governed by equitable or public policy considerations. These considerations, according to defendants, militate against any award of damages to Allnet based on excessive earnings. The defendants argue, in effect, that the damages Allnet seeks are equivalent to refunds that would have been required under the refund mechanism invalidated by the court in *AT&T v. FCC.* We do not agree. We are concerned here with determining whether a particular customer, which has availed itself of a statutory complaint remedy under Title II of the Act, has sustained any measurable damage that can be traced to defendants' violations of the Act. Although a damages award under Section 208 of the Act might well be equal or substantially similar to a refund ordered under Section 204 of the Act,[51] this does not transform a private complaint action into a public enforcement proceeding subject to broad public interest considerations.

25. In addition, we reject defendants' contention that a damages award to Allnet is precluded because it would drive USWC's overall rate of return for USWC in the aggregate below the minimum necessary to raise capital to confiscatory levels. Assuming *arguendo,* that such an inquiry is relevant to a Section 208 damages claim, defendants have failed to provide sufficient record evidence for the Commission to assess the impact of any damages award upon its overall interstate rate of return. While defendants have provided some data in Exhibit A to its brief,[52] these data made no clear showing of the amount by which an award to Allnet would reduce USWC's overall interstate earnings or rate of return let alone that any such reduction would be confiscatory. For the reasons stated in the *MCI Damages Order,*[53] we find defendants' other equitable arguments regarding the uncertainty surrounding tariff filings during the 1985-1986 period and an alleged windfall to Allnet should it receive restitution equally unavailing.

26. Defendants provide specific calculations for offsets and raise factors they believe should reduce Allnet's damages claim. Defendants state that Allnet's base damage awards should be reduced by approximately $331,098 to take into account underearnings in the switched traffic sensitive category for Colorado, South Dakota, Idaho-North, and Washington, and in the special access category for South Dakota. Defendants also contend that Allnet's claim is 5overstated because several items were excluded from MTN's rate base when it filed its Form 492.[54] Defendants also contend that Allnet's claim against NWB should be amended because the tax rates USWC submitted for NWB were marginal rather than effective tax rates.[55]

27. We have carefully reviewed the arguments and evidence presented by the parties and believe that some offset to the claimed damages amounts is appropriate.[56] In the *MCI Liability Order,* we specifically rejected claims by the defendants that the Commission is required to take a car-

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[46] Indeed, the court in *Ohio Bell* recognized the continuing efficacy of our rate of return framework. *See* 949 F.2d at 868.

[47] *MCI Liability Order,* 5 FCC Rcd at 223, para. 56.

[48] In the *MCI Liability Order,* we held that the complainant therein could prove that defendants' rates were unjust and unreasonable by proving that the defendants violated our rate of return prescription. *See MCI Liability Order,* 5 FCC Rcd at 226.

[49] *Illinois Bell,* 966 F.2d at 1481.

[50] *Id.* at 1483. The court stated

> We conclude that when the FCC investigates and remedies an unreasonable rate which it has theretofore permitted to become fully effective without a suspension order, it acts under § 205, not § 204. We further conclude that the Commission has no authority under § 205 to order refunds contemplated only under § 204.

Id. The court clearly did not limit or even address this Commission's authority to order damages in a Section 208 proceeding.

[51] *See Seaboard,* 442 U.S. 444, 455, n.8:

> If a shipper proves a rate is unreasonable and that he was damaged in the full amount he was overcharged, the outcome of a § 13(1) [§ 208] proceeding will be no different than that of a § 15(8)(a) [§ 204] proceeding in which the carrier fails to establish the reasonableness of the rate.

[52] Exhibit A contains a summary and compilation of information submitted in defendants Form 492 for the relevant monitoring period, a calculation of how much money USWC would have earned if its entire carrier enterprise earned exactly at a 12.75% rate of return, and the same calculation at a 13.10% rate of return.

[53] *MCI Damages Order* at para. 32.

[54] In addition, USWC argues that in calculating its damages claim, Allnet ignored the fact that MTN's and NWB's reported rates of return were not accurate because the Commission's rate base formula disallows "significant amounts of prudently invested carrier capital." USWC RBr. at 4.

[55] We note that Allnet used the effective tax rate in calculating the "grossing up" of MTN's overearnings. Thus, we agree that the effective tax rate should also be used to calculate NWB's overearnings.

[56] We note that defendants assert that underearnings in Idaho-N and Washington in the switched traffic sensitive category should be used to offset overearnings in the same category.

rier's interstate access underearnings as well as overearnings into account in determining whether a violation of the Act has occurred because this would be at odds with established case law.[57] However, we stated in the *MCI Damages Order* that it is appropriate to consider defendants' underearnings in assessing complainant's damage, or injury, resulting from defendants' overearnings in a particular monitoring period[58] and rejected the complainant's contention that this approach results in unlawful cross-subsidization.[59] The parties have made no argument which persuades us to alter our holdings.

28. We award damages to Allnet from MTN in the amount of $72,243. In reaching this amount, we adjusted Allnet's calculation of MTN's overearnings assuming a maximum lawful rate of return of 13.25% rather than 12.75% for the switched traffic sensitive and special access categories. We are not allowing MTN an offset for underearnings in Colorado because MTN recalculated its rate of return in the switched traffic sensitive category using disallowed items[60] and then calculated its offset using the target plus buffer rate of 13.25% rather than the 12.75% target rate. When these errors are corrected, MTN did not underearn in Colorado.[61]

29. We award damages to Allnet from NWB in the amount of $96,538.[62] In reaching this amount, we have adjusted Allnet's calculation of NWB's overearnings by state assuming a maximum lawful rate of 13.25% rather than 12.75% in the special access and switched traffic sensitive categories. We also agree with defendants that the effective rather than the marginal tax rate should be used and have recalculated Allnet's damages using that rate provided by NWB. In addition, we have allowed NWB offsets for underearnings in South Dakota of $12,104 in the special access category and $6,243 in the switched traffic sensitive category.[63]

2. Interest Claims

a. Contentions of the Parties

30. Defendants' final claim is that Allnet is not entitled to prejudgment interest should the Commission award damages to Allnet. Defendants simply contend that while the Commission may award interest under Section 204 of the Act, there is no provision for the award of interest under Section 206 of the Act. Because we cannot lawfully grant Allnet a refund, defendants argue, we may not award interest.[64]

31. Allnet disputes defendants' claims that it is not entitled to prejudgment interest in connection with any ultimate damages award. Allnet contends that an award of prejudgment interest is allowed pursuant to Section 206. According to Allnet, its 15% cost of money interest rate is well below defendants' 16-24% tariffed interest rates. Allnet also argues that an award of interest is required to make it whole.[65]

b. Discussion

32. Defendants' claim that the Commission lacks the requisite authority to award interest in a Section 208 common carrier complaint proceeding has no merit. Although an award of interest does not fall squarely within the ambit of Section 208 of the Communications Act, our authority under Sections 4(i) and other sections of the Act to award interest in a common carrier complaint case is well established.[66] In deciding whether to award interest in a particular common carrier complaint case we are generally guided by federal court practice, where the award of prejudgment interest ". . . is a matter left to the sound discretion of the trial court."[67] The award of interest in a common carrier complaint case is thus guided by considerations of fairness. Applying this standard, we are persuaded that an award of interest is appropriate in this case. Allnet was effectively

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However, Allnet does not claim damages from PNB. Accordingly, we will not allow defendants to offset overearnings by MTN and NWB by underearnings of PNB.

[57] *MCI Liability Order*, 5 FCC Rcd at 223, paras. 59-60, citing *Nader v. FCC*, 520 F.2d 182, 201 (D.C. Cir. 1975). *See also New England Telephone and Telegraph Co. v. FCC*, 826 F.2d 1101 (D.C. Cir. 1987), *cert denied*, 109 S. Ct. 1942 (1989); and *AT&T v. FCC*.

[58] *MCI Damages Order* at para. 38.

[59] *Id.* at para. 39.

[60] We reject MTN's argument that Information and Intercept elements should be included in the calculation of MTN's rate of return for the switched traffic sensitive category. These items were not included by state on MTN's Form 492 and we will not allow adjustments to be made to those reported figures. As we discussed in the *MCI Liability Order*, the Form 492 is a final report and carriers may rely upon it. *MCI Liability Order*, 5 FCC Rcd at 225, para. 78. We also reject USWC's contention that the Commission's rate base formula disallows items that should be included, thus overstating USWC's actual rate of return. USWC's argument is an impermissible collateral attack on a prior Commission decision. *See* Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, Decision on Remand, CC Docket No. 86-497, 7 FCC Rcd 296 (1991), *appeal docketed sub nom. Illinois Bell Telephone Co., et al. v. FCC*, No. 90-1020 (D.C. Cir. Jan. 11, 1991).

[61] MTN earned $38,996,000 in the switched traffic sensitive category in Colorado. Using the target category rate of return of 12.75%, MTN was allowed earnings of $37,701,113. MTN cannot be said to have underearned in the switched traffic sensitive category to the extent that its earnings exceeded the target earnings level. *See infra* n.61.

[62] This amount is calculated as follows:

$	114,885	(overcharges)
-	12,104	(undercharges - special access category)
-	6,243	(undercharges - switched traffic sensitive category)
$	96,538	Damages

[63] We note that USWC calculated offsets for category underearnings at 13.25%. USWC should have used the authorized target rate of 12.75%. A carrier cannot be said to have underearned to the extent its earnings exceeded the target category rate of return. Therefore, USWC's offset calculations are in error to the extent it calculated underearnings in particular categories using the category target rate of return plus buffer. We recalculated NWB's offsets to allow only for underearnings below 12.75%.

[64] USWC Br. at 13.

[65] Allnet RBr. at 11.

[66] *See* MCI Telecommunications Corp. v. American Tel. & Tel. Co., *et al.*, 94 FCC 2d 332, 343-46 (1983).

[67] *United States v. California Board of Equalization*, 650 F.2d 1127, 1132 (9th Cir. 1981), *aff'd*, 456 U.S. 901 (1982), *reh'g denied*, 456 U.S. 985 (1982).

deprived of the use of the excessive amounts it paid the defendants as a result of their unlawful rates while the defendants, on the other hand, enjoyed the beneficial use for a substantial period of time of funds to which Allnet rightfully has a claim. We are persuaded that interest is required not only to effect a full and fair remedy for Allnet, who paid rate higher than it would have paid had defendants earned within the prescribed level, but also to avoid any unjust enrichment of defendants stemming from their charging rates that we have determined to be unjust and unreasonable underx Section 201(b) of the Act.[68] We conclude that interest should be computed at the IRS rate for tax refunds.[69] In addition, we find that interest should begin to accrue from January 1, 1987, the day after which the 1985-1986 monitoring period ended. At that point, defendants were subject to the earnings limitations of a new monitoring period. Accordingly, we award interest calculated at the IRS rate for tax refunds[70] from The Mountain States Telephone and Telegraph Company and Northwestern Bell Telephone Company to Allnet from January 1, 1987 until the date of full payment to Allnet.

III. EQUAL ACCESS

33. The second count of Allnet's complaint alleges that defendants' failure to provide intraLATA[71] interstate presubscription, or "dial-1" intraLATA interstate access to other carriers, including complainant, constitutes a denial of equal access in violation of the Commission's access rules. Allnet further alleges that defendants' provision of dial-1 intraLATA interstate access to themselves, while denying such access to competing carriers like Allnet, constitutes unreasonable discrimination, in violation of Section 202(a) of the Act.[72] In addition, Allnet argues that the defendants assess full premium access charges on Allnet in end offices where defendants have failed to providedial-1 interstate intraLATA access, which violates Section 69.205 of the Commission's access charge rules.[73]

A. Contentions of the Parties

34. As referenced above, Allnet alleges that the failure of defendants to provide dial-1 access to its intraLATA interstate competitors, like Allnet, constitutes a denial of equal access. Allnet asserts that defendants' customers are able to access defendants' intraLATA interstate services on a dial-1 basis while Allnet customers in defendants' serving territory must dial a 10XXX prefix, or access code, in addition to dialing the called number to access Allnet's intraLATA services.[74] Allnet contends that the ability to access defendants' on a dial-1 basis provides defendants with an artificial competitive advantage over Allnet in the intraLATA interstate market. According to Allnet, the Commission has not specifically reserved dial-1 access for intraLATA interstate traffic to defendants. Further, Allnet states that the Commission's rules require that non-premium access charges be assessed on those carriers who are denied access equal to that provided to the Message Telephone Service/Wide Area Telephone System (MTS/WATS) provider.[75] Thus, Allnet reasons, since its access is not equal to that of defendants as the MTS/WATS providers, Allnet should not be assessed full premium access charges by defendants.

35. In response, defendants argue that the defendants' companies do not provide dial-1, 1+, or presubscription for access minutes used for intraLATA interstate services because the Commission and the MFJ-oversight court do not require dialing parity for intraLATA interstate calls.[76] Defendants aver that the Commission requires local exchange companies to provide IXCs with MTS-WATS access that is substantially equivalent to the access provided for AT&T's MTS or WATS. Defendants argue that the Commission has found that Feature Group D (FGD) service, which it claims Allnet receives, satisfies the Commission's requirements.[77] While defendants readily concede that the Commission requires the BOCs to provide dial-1 access, or presubscription, to a designated IXC for interLATA interstate calls, they contend that the Commission has not ordered the BOCs to provide dial-1 access, or presubscription, for intraLATA interstate traffic, but merely announced an intent to investigate the provision of intraLATA interstate access services.[78] Defendants also contend that the courtXNhas specifically rejected similar requests by IXCs that equal access be construed to require the BOCs to provide presubscription for intraLATA inter-

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[68] *See New England Telephone and Telegraph Co. v. FCC*, 826 F.2d 1101, 1113 (D.C. Cir. 1987), *cert. denied*, 109 S. Ct. 1942 (1989) (carriers may reasonably be required "to pay full interest for earnings they had no right to retain in the first place.").

[69] We believe that the rationale adopted by the Commission for applying the IRS rate in pole attachment complaint proceedings under Section 204 of the Act, 47 U.S.C. § 204, is equally applicable here. In Teleprompter of Fairmont v. C&P of West Virginia, 79 FCC 2d 232 (1980), the Commission stated

> As a matter of fairness, we believe that the rate of interest applied in a pole attachment complaint proceeding should be readily available, easily applied, and periodically revised to reflect changes in borrowing costs. In light of these considerations, we find the interest rate for federal tax refunds and additional tax payments suitable for use in this type of proceeding. This rate appears in a variety of easily obtained official and commercial publications, and is revised on a regular basis.

79 FCC 2d at 238 [footnote omitted].

[70] The applicable IRS rates are set forth in Appendix A.

[71] Local Access and Transport Area, a term created by the divestiture decree, refers to a geographically based area to which Bell Operating Companies' (BOCs) telecommunications service is confined.

[72] 47 U.S.C. § 202(a).

[73] 47 C.F.R. § 69.205.

[74] Allnet Complaint at paras. 10-11.

[75] *Id.* at para. 11.

[76] USWC Answer at para. 28.

[77] USWC Motion to Dismiss at 19.

[78] USWC Reply to Opposition at 13 *citing Southwestern Bell Telephone Company*, CC Docket No. 88-287, 4 FCC Rcd 2580 (Com. Car. Bur. 1989). *See also* Southwestern Bell Telephone Company, Transmittal No. 1629, CC Docket No. 88-287, Memorandum Opinion and Order, 3 FCC Rcd 3694 (1988), Order, 3 FCC Rcd 4527 (1988), *recon.*, 3 FCC Rcd 5786 (Com. Car. Bur. 1989), Southwestern Bell Telephone Co., *et al.*, 6 FCC Rcd 3760 (1991).

state access.[79] Further, defendants deny Allnet's assertion that they improperly assess premium access charges for non-premium access. Defendants argue that they provide premium FGA, FGB and FGD access for which premium access charges apply.

36. In reply, Allnet reiterates its main arguments, noting that defendants did not deny that they have failed to provide presubscription for intraLATA interstate dial-1 access on a non-discriminatory basis or that the Commission has not explicitly reserved dial-1 access for interstate intraLATA traffic for defendants. Allnet argues that defendants' reliance upon the MFJ court's decision regarding intraLATA interstate dial-1 equal access is misplaced because the Commission has altered the court's definition of equal access. Allnet contends that the MFJ court deals with violations of the antitrust laws, not with enforcement of the Communications Act or Commission policies and rules.[80] Allnet also argues that the Commission has not approved, or found lawful through a tariff investigation, defendants' denial of intraLATA, interstate presubscription to Allnet. Allnet refutes the relevance of the Commission's proceeding involving Southwestern Bell Telephone Company because it only deals with the failure of "adjunct" devices to provide intraLATA, interstate dial-1 access. Allnet maintains that the defendants already provide dial-1 intraLATA equal access, but only to themselves. According to Allnet, the Commission has previously settled this issue,[81] requiring dial-1 intraLATA equal access for interstate traffic over WATS access lines.[82] Allnet argues that defendants, as the interstate intraLATA MTS-WATS providers in their serving areas, have failed to provide access equal to the access that defendants provide themselves. Further, Allnet reiterates its point that failure to provide access equal to that of the MTS-WATS provider requires that non-premium access charges be assessed on customers denied premium access.

B. Discussion

37. Allnet's threshold claim that defendants are required to provide it intraLATA, interstate presubscription under the terms of Commission rules and decisions is unavailing.[83] Presubscription is the process by which customers are afforded an opportunity to select a specific IXC as the primary carrier to handle their interstate, interexchange traffic. Specifically, the Commission has defined presubscription as "the process by which end user customers may select... one primary interexchange carrier... to carry their "1+" interLATA long distance calls."[84] Contrary to Allnet's claims, the Commission has not, as part of the presubscription process, required the BOCs or other LECs to provide "1+" access for interstate, intraLATA MTS calls.[85]

38. Nor are we persuaded by Allnet's argument that the defendants' failure to provide intraLATA, interstate presubscription constitutes unjust and unreasonable discrimination under Section 202(a). At the outset, we find, and the parties do not contend otherwise, that the defendants' failure to provide Allnet with the same dial-1 access for intraLATA, interstate services that defendants themselves enjoy constitutes a form of discrimination in defendants' provision of "like communication service" within the meaning of Section 202(a) of the Act.[86] The question to be resolved here is whether the discrimination is justified and thus not unreasonable under Section 202(a).[87] We conclude that it is.

39. As noted above, it is undisputed that a difference in dialing sequence exists in the defendants' provision of intraLATA, interexchange access to themselves and the access provided to Allnet and other IXCs. Although discrimination exists in the present access arrangement, it is not a form of discrimination that can be easily eliminated. Under current presubscription practices, it is not possible to presubscribe to more than one interstate carrier.[88] As a practical matter, if we were to require intraLATA, interstate presubscription, it would be highly unlikely that any

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[79] USWC Answer at para. 27, citing *United States v. Western Electric Co.*, 569 F. Supp. 1057, 1107-10 (D.D.C. 1983) (*MFJ Implementation Order*).

[80] Allnet Opposition to Motion to Dismiss at 30.

[81] Allnet Reply at 8, referring to the Commission's CC Docket No. 83-1145. Allnet does not provide a specific cite, but we presume that Allnet is referring to Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I, 101 FCC 2d 911 (1985) (*Divestiture Related Tariffs*).

[82] Defendants respond that Allnet's reliance upon the *GTE Order* is misplaced because that proceeding involved a General Telephone Operating Company (GTOC) tariff which required all "1+" intraLATA traffic to be routed through the GTOC. Defendants contend that the *GTE Order* did not require LECs to offer intraLATA interstate presubscription.

[83] Any claim regarding violations of the MFJ is appropriately raised with the District Court, not the Commission. We note that the District Court faced with a similar request from certain IXCs, denied them equal access relief. *See MFJ Implementation Order*, 569 F. Supp. at 1108.

[84] *Divestiture Related Tariffs*, 101 FCC 2d at 928.

[85] The Commission established an Allocation Plan under which, *inter alia*, customers would choose one IXC for their interLATA long distance calls. The Allocation Plan, by its terms, applied only to the choice of IXCs in their provision of interLATA interstate calls and not to LECs in their provision of intraLATA interstate calls. *Divestiture Related Tariffs*, 101 FCC 2d at 927-934 (Appendix B).

[86] Section 202(a) provides:

> It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communications service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

[87] To establish a claim that a carrier has engaged in unjust and unreasonable discrimination within the meaning of Section 202(a), a complainant must plead facts showing that the services at issue are like and that there is a difference in the carrier's provision or pricing of the services. Once like services and disparate treatment or pricing is shown, the burden shifts to the carrier to show that the discrimination is not unjust and unreasonable. *See MCI Telecommunications Corp. v. FCC*, 917 F.2d 30, 39 (1990).

[88] We note that to the extent a LEC provides interexchange, interstate services as in the instant case, it is considered an IXC regardless of how limited the scope of such service may be. Therefore, to the extent they provide such service, defendants could obtain eligibility to appear on a presubscription ballot in the event a general interLATA, interstate offering were required.

customers would select the LEC for *intraLATA*, interstate calling because customers choosing the LEC would need to use IXC access codes, such as 10XXX, for all *interLATA*, interstate calls. The only other solution would be to require LECs to provide dual or multicarrier presubscription.[89] While dual or multicarrier presubscription may not be technically impossible, it would likely entail significant administrative costs and added complexity both in terms of changing presubscription procedures and in educating consumers with a different access routine. Short of requiring dual presubscription then, the discrimination complained of here can be eliminated only by requiring LECs to offer 1+ presubscription for intraLATA, interstate calling. But as noted above, such a remedy would have the practical impact of excluding the BOCs from the interstate, intraLATA market. Thus, the discrimination in dialing cannot be eliminated, only reversed in terms of the potentially aggrieved parties. Since this is not a case involving the question of LECs failing to meet their equal access obligations to interLATA, interexchange IXCs, we would have to be persuaded that other equitable factors, not presented here, were of overriding concern.

40. We do not find, therefore, Allnet's claim of unreasonable discrimination, which relies in large part on what Allnet describes as differences in the access provided to defendants, on the one hand, and IXCs on the other, to be persuasive under the circumstances described above. Nor has Allnet provided any other evidence or argument in the record before us thatwould persuade us to broaden, in the context of this Section 208 complaint proceeding, the Commission's presubscription procedure.[90] Based on the record in this proceeding, we do not believe that the potential competitive benefits in the relatively small intraLATA, interstate market that could result from such broadening justify the additional cost of requiring that the BOCs implement intraLATA, interstate presubscription requirements.[91] The fact that customers are able to place "1+" intraLATA, interstate calls through the BOC but must first dial an additional five digits in order to place the same call through an IXC does not, based on our review of the record before us, and under the particular circumstances presented here, constitute unjust and unlawful discrimination within the meaning of Section 202(a).

41. We are similarly not persuaded by Allnet's argument that it should be assessed non-premium charges because of the defendants' failure to provide dial-1 service. We have already concluded that defendants did not engage in unreasonable discrimination against Allnet. Nor do the Commission's rules require LECs to charge discounted rates for the type of access provided to Allnet.

42. During the transition to equal access, the Commission required discounts on line-side interstate access service because it was substantially inferior to the trunk-side access provided to the MTS/WATS provider, or AT&T.[92] Once access arrangements for a given IXC became substantially equivalent to the access provided to AT&T, the rate disparity was eliminated. Feature Group D, as provided to Allnet by defendants, has been accepted by the Commission as suitable for meeting the BOC and LEC equal access obligations.[93] Since neither Feature Group D nor the Commission's presubscription procedures comprehend 1+ calling access for intraLATA, interstate calls, the absence of this capability|does not render this form of access subject to discounted rates.[94] Based on these considerations, we deny Allnet's request in this complaint proceeding that it be charged discounted rates.[95]

IV. LATE PENALY INTEREST

A. Contentions of the Parties

43. The third and final count of Allnet's complaint alleges that defendants' annualized interstate late payment interest charges (LPIC) were unjust and unreasonable for the period November 1986 through October 1989. Allnet argues that defendants' LPIC of 24%, was more than double the short-term lending rates in effect during 1985-1986 and far in excess of the LPIC charges that other regulatory commissions have generally found to be reasonable.[96] According to Allnet, state regulatory agencies who have ruled

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[89] Dual or multicarrier presubscription would mean that the caller would dial 1+ for all interstate calls, with calls routed to different carriers based on geographic location of the called number.

[90] Insofar as Allnet contends that the defendants should be required to provide dial-1 intraLATA, interstate access to it and other IXCs, we believe this issue is more appropriately addressed in the context of a rulemaking proceeding in which all affected parties would have an opportunity to participate. Our determination here is that the record developed in this Section 208 complaint proceeding does not support a finding that the defendants' failure to provide dial-1 access for intraLATA, interstate traffic constitutes unreasonable discrimination within the meaning of Section 202(a).

[91] We note that in an unrelated proceeding, Allnet has raised the issue whether the ability of a consumer to presubscribe to a preferred long distance carrier should extend to all interstate calls rather than only to interstate calls that also cross a LATA boundary as is presently the case. *See* Administration of the North American Numbering Plan, CC Docket No. 92-237, Phase II, Notice of Proposed Rulemaking, Reply Comments of Allnet Communication Services, Inc. at 1. Our determination here should not be construed as prejudging the issues and arguments presented by the parties to that proceeding.

[92] MTS and WATS Market Structure, CC Docket No. 78-72 (Phase I), 97 FCC 2d 834, 886 (1984).

[93] *See, e.g., Divestiture Related Tariffs*, 101 FCC 2d 911.

[94] We note that our rules do not provide for discounting in all cases involving provision of differing access. For example, in a case involving access arrangements within Puerto Rico for off-island calls, we determined that the need to enter additional digits to access certain carriers was not so burdensome as to warrant reduced access rates. Inquiry Into Policies to be Followed in the Authorization of Common Carrier Facilities to Provide Telecommunications Service off the Island of Puerto Rico, 8 FCC Rcd 63 (1992). The dialing disparity in that case was at least as significant as in the instant case.

[95] With respect to Allnet's partial reliance upon a previous case involving access provided by the GTE Operating Companies, we agree with the defendants that the case involved sufficiently different circumstances as to be distinguished from the present matter. There, users were not afforded the opportunity to access an IXC's network through the use of an alternate, or 10XXX, dialing code. Rather, all 1+ intraLATA traffic, including interstate calls, had to be routed through the LEC. *See GTE Order*, 2 FCC Rcd at 3346-47.

[96] Allnet Brief on Late Penalty Interest at 1.

upon the lawfulness of LPIC generally support LPIC charges for residential and commercial customers between 12%-18% during the period in question. Allnet asserts that the Commission has a longstanding policy requiring all rates, including LPIC charges, to be based on costs, not on whether the charge is similarly assessed upon the LEC.[97] Allnet contends that defendants' LPIC charges far exceed the cost of money, or the cost of short-term financing to cover its cash flow until late-paying customers pay their bills in full. As a large corporation, Allnet reasons that defendants should have an excellent credit rating, which would make it unlikely that they have high risk financing. Further, Allnet points out that although the LPIC is in defendants' tariff, that does not mean that the level of the LPIC is lawful. According to Allnet, the Commission did not investigate the lawfulness of defendants' LPIC charge but simply allowed it to take effect with the tariff as a whole. Thus, Allnet argues that the Commission should find defendants' LPIC of 24% as unreasonable in violation of Section 201(b).

44. In response to Allnet's claim that its LPIC level of 24% was unreasonable, defendants argue that their tariffs followed Commission policy with respect to the application of late payment penalty charges. Defendants contend that the Commission's sole concern regarding such charges is that, whatever the level of the charge, it be applied even-handedly to IXC deposits, or overpayments, as well as to IXC late payments.[98] According to defendants, the Commission has had opportunities to prescribe or pass judgment on the level of the factor applicable to late payment of access charges. As further support for its argument that the Commission's policy on interest charges is one of evenhanded application, defendants cite *AT&T's Petition to Rectify Terms and Conditions of 1985 Annual Access Tariffs*[99] where the Commission restated this policy in discussing penalty interest for late payment of access bills. Defendants maintain that their tariffs conform to this policy of evenhandedness. Defendants also argue that the purpose of the late payment penalty is to create the incentive for access customers to pay on time, and if not on time, sooner rather than later. Further, defendants contend that usury limitations do not apply to commercial transactions. Defendants argue that interest rates applicable to consumer transactions, such as interest on credit cards, home mortgage loans, or substantial underpayments involving tax-motivated transactions, typically reach levels of 18% or more.[100] Defendants reason that it is not unreasonable to apply an LPIC of 24% to large and sophisticated corporations for late payments under interstate access tariffs.

45. In its Reply Brief on LPIC charges, Allnet states that this is a case of first impression for the Commission because it has not addressed the reasonableness of LPICs.[101] Allnet states that although it did not rely on usury law ceilings with respect to reasonable interest rates, Allnet argues that exemptions for commercial transactions do not exempt interstate access tariffs from usury law ceilings. Further, Allnet argues that defendants' LPIC is a recurring one, not a one-time charge as with late mortgage or income tax payments. Allnet concludes that defendants' LPIC far exceeded any other annual, recurring LPIC, including those cited by defendants.

46. Defendants attempt to refute Allnet's basic premise that LPIC charges must be based on the cost of money or that defendants' annualized rate of 24% was *per se* unreasonable because of certain state agency decisions in support of LPICs equivalent to interest rates of 12.18% by pointing out that late charges for telecommunications services are governed by tariffs and that defendants' state tariffs basically mirror their interstate tariffs.[102] Defendants state that their intrastate penalty charges for late payments have not been found unreasonable by any state commission. Defendants also argue that Allnet's reliance on several state decisions is misleading and misplaced because the cases cited concern states outside of the defendants' serving territory and the relevant time period.[103] In addition, defendants claim that Allnet confuses a charge assessed as an incentive for prompt payment with competitive lending rates.

B. Discussion

47. The Commission's primary concern in the area of penalty interest charges has been that there be even-handed application of interest charges by the LECs.[104] We note that defendants' current tariffs do reflect an even-handed application of interest. In this case, however, after reviewing the evidence and arguments submitted by the parties, we conclude that Allnet has successfully challenged the reasonableness of the actual level of the defendants' 24% LPIC during the period in question.

48. At the time the 24% late payment charges were initiated by the defendants, the Commission's principle benchmark of what constituted reasonable rates was attributable costs. Thus, in cases where carrier-initiated rates were contested, factors relating to cost became the key to quantitative resolution. In connection with late payment charges, however, the Commission also imposed a qualitative requirement upon the LECs which required LECs to apply the same interest rate on such charges as the interest rate paid by the LECs on retained customer overpayments.[105] In contrast to requirements relating to costs, this latter requirement reflects a matter of equity and does not confer any special status to the rate itself or otherwise imply a finding of lawfulness. Defendants, for their part, argue, first, that the qualitative requirement of the Commission was duly met, and second, the very fact that the Commission allowed the 24% rate to become effective in the tariff implied a finding that the rate was lawful. Neither argument is persuasive. Defendants offer no support for their contention that a carrier cannot be found to have violated the Act by charging the rates in its tariff. Under the scheme of the Act, allowing a tariff to become

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[97] *Id.* at 8.
[98] USWC Brief on Late Penalty Interest at 3, *citing Investigation of Access and Divestiture Related Tariffs*, 97 FCC 2d 1082 (1984).
[99] 3 FCC Rcd 5071 (1988) (*Petition to Rectify Terms*).
[100] *Id.* at 10.
[101] Allnet Reply Brief on LPIC at 1-2.
[102] USWC Reply Brief on LPIC at 2.
[103] *Id.*
[104] LECs must grant their interstate access customers the same right to receive interest on retained customer overpayments as LECs grant themselves with respect to customer late payments. *See Petition to Rectify Terms*, 3 FCC Rcd at 5072.
[105] *See id.*

effective without suspension and investigation does not imply lawfulness. On the contrary, legally effective, carrier-initiated tariffs can always be challenged as unreasonable and unlawful. While the filed rate becomes the legal rate upon effectiveness, to the extent it is the only rate a carrier can charge, the lawfulness of the rate may be challenged at any time thereafter.[106] No rate, though, is a lawful rate until it is found so by the Commission after hearing and investigation. Allnet, for its part, citesnumerous contemporaneous interest rates from such sources as real estate, credit cards, and commercial lending rates, which tend to show that the defendants' 24% charge was well above the general norm. Partly in recognition of this, defendants argue that a late payment charge should be somewhat above the norm to discourage a continued pattern of late payments. Defendants, however, provide no quantitative support for the notion that a higher rate is necessary or effective in discouraging late payments nor have they been able to point to any financial or economic support for the 24% rate as initially filed with the Commission. For these reasons, we believe complainant has met its burden in providing evidence of unlawfulness which defendants have failed to refute.

49. For the foregoing reasons, we find that the defendants' former LPIC of 24% was *per se* unjust and unreasonable under Section 201(b) of the Act, and that defendants should refund Allnet an amount equal to the difference between a late penalty payment assessed at the 24% rate and such a payment assessed at what would have constituted a reasonable rate based on equitable considerations.[107] To this end, the parties are instructed to work constructively toward settlement of this matter. If after 90 days from release of this Memorandum Opinion and Order no settlement has been achieved, the parties are further instructed to file with the Commission a report outlining progress made to that date and to specify any reasons why they believe that Commission intervention is necessary.

IV. CONCLUSION

50. We have carefully reviewed the extensive record before us and have found, to the extent indicated herein, that complainant is entitled to an award of damages, plus accumulated interest on such damages, for The Mountain States Telephone and Telegraph Company's and Northwestern Bell Telephone Company's violations of our rate of return prescription for the 1985-1986 monitoring period. We have also concluded that the complainant has failed to establish that the defendants violated Sections 201(b) and 202(a) of the Act in failing to provide dial-1 access in the manner requested by the complainant or that defendants are required to assess non-premium access rates. Finally, we have found that the defendants' former LPIC of 24% was *per se* unreasonable under Section 201(b) and have ordered the parties to work towards a settlement regarding the amount to be refunded.

V. ORDERING CLAUSES

51. Accordingly, IT IS ORDERED, pursuant to Section 4(i), 4(j), 201, 206, 207, 208 and 209 of the Communications Act, as amended, 47 U.S.C. §§ 4(i), 4(j), 201, 206, 207, 208 and 209, that the above-captioned complaint filed by Allnet Communication Services, Inc. IS GRANTED to the extent discussed herein and otherwise IS DENIED.

52. IT IS FURTHER ORDERED that The Mountain States Telephone and Telegraph Company SHALL PAY to Allnet Communication Services, Inc. the sum of $72,243 (Seventy-two thousand two hundred forty-three dollars) within 60 days after release of this Memorandum Opinion and Order; and that Northwestern Bell Telephone Company SHALL PAY to Allnet Communication Services, Inc. the sum of $96,538 (Ninety-six thousand five hundred thirty-eight dollars) within 60 days after release of this Memorandum Opinion and Order.

53. IT IS FURTHER ORDERED that The Mountain States Telephone and Telegraph Company and Northwestern Bell Telephone Company SHALL PAY Allnet Communication Services, Inc. interest on the damages awarded here at the IRS rates set forth in Appendix A from January 1, 1987 until the date full payment is made.

54. IT IS FURTHER ORDERED that Allnet Communication Services, Inc. and U S West SHALL SETTLE upon an amount to be refunded for assessment of excessive penalty interest within 90 days after release date of this Memorandum Opinion and Order, or file a progress report with the Commission if no settlement is reached within the 90 days.

55. IT IS FURTHER ORDERED that the Motions To Accept Late-Filed Pleadings filed by U S West on December 13, 1988 ARE GRANTED.

56. IT IS FURTHER ORDERED that the to Motion to Dismiss filed by U S West on January 5, 1989 IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[106] *Arizona Grocery v. Atchison T. & S.F.R. Co.*, 284 U.S. 370 (1932). We previously reemphasized the principle that carrier-initiated tariffs can always be challenged as unreasonable and unlawful in the *MCI Liability Order*, 5 FCC Rcd at 222.

[107] The Commission has not issued minimum or maximum levels for penalty interest rates and we will not do so now. We refrain from unnecessary and unwarranted intervention in business relationships between LECs and their IXC customers. *See Petition to Rectify Terms*, 3 FCC Rcd 5071.

APPENDIX A

Effective Period	Rate	Internal Revenue Service Citation
01/01/87 - 03/31/87	8%	Rev.Rul. 146, 1986-2 C.B. 208
04/01/87 - 06/30/87	8%	Rev.Rul. 87-23, 1987-13 I.R.B. 46
07/01/87 - 09/30/87	8%	Rev.Rul. 87-62, 1987-29 I.R.B. 10
10/01/87 - 12/31/87	9%	Rev.Rul. 87-87, 1987-36 I.R.B. 8
01/01/88 - 03/31/88	10%	Rev.Rul. 87-131, 1987-50 I.R.B. 6
04/01/88 - 06/30/88	9%	Rev.Rul. 88-17, 1988-10 I.R.B. 6
07/01/88 - 09/30/88	9%	Rev.Rul. 88-50, 1988-25 I.R.B. 39
10/01/88 - 12/31/88	10%	Rev.Rul. 88-86, 1988-41 I.R.B. 1
01/01/89 - 03/31/89	10%	Rev.Rul. 88-105, 1988-51 I.R.B. 4
04/01/89 - 06/30/89	11%	Rev.Rul. 89-36, 1989-1 C.B. 309
07/01/89 - 09/30/89	11%	Rev.Rul. 89-69, 1989-1 C.B. 310
10/01/89 - 12/31/89	10%	Rev.Rul. 89-99, 1989-2 C.B. 256
01/01/90 - 03/31/90	10%	Rev.Rul. 89-125, 1989-2 C.B. 257
04/01/90 - 06/30/90	10%	Rev.Rul. 90-19, 1990-1 C.B. 186
07/01/90 - 09/30/90	10%	Rev.Rul. 90-47, 1990-1 C.B. 187
10/01/90 - 12/31/90	10%	Rev.Rul. 90-71, 1990-35 I.R.B. 4
01/01/91 - 03/31/91	10%	Rev.Rul. 90-94, 1990-46 I.R.B. 16
04/01/91 - 06/30/91	9%	Rev.Rul. 91-20, 1991-11 I.R.B. 1
07/01/91 - 09/30/91	9%	Rev.Rul. 91-33, 1991-21 I.R.B. 1
10/01/91 - 12/31/91	9%	Rev.Rul. 91-50, 1991-37 I.R.B. 1
01/01/92 - 03/31/92	8%	Rev.Rul. 91-65, 1991-51 I.R.B. 1
04/01/92 - 06/30/92	7%	Rev.Rul. 92-21, 1992-14 I.R.B. 14
07/01/92 - 09/30/92	7%	Rev.Rul. 92-44, 1992-24 I.R.B. 86
10/01/92 - 12/31/92	6%	Rev.Rul. 92-77, 1992-38 I.R.B. 12

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ALLNET COMMUNICATION SERVICES, INC.
Complainant,

v.

ILLINOIS BELL TELEPHONE COMPANY,	File No. E-91-030
INDIANA BELL TELEPHONE COMPANY,	File No. E-91-031
MICHIGAN BELL TELEPHONE COMPANY,	File No. E-91-032
OHIO BELL TELEPHONE COMPANY,	File No. E-91-033
WISCONSIN BELL, INC.,	File No. E-91-034

Defendants.

MEMORANDUM OPINION AND ORDER

Adopted: March 24, 1993; Released: May 3, 1993

By the Commission:

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I. INTRODUCTION

1. In this Memorandum Opinion and Order we find that the complainant Allnet Communication Services, Inc. (Allnet), has met its burden of establishing that the defendant local exchange carriers (LECs)[1] have violated Section 201(b) of the Communications Act of 1934, as amended (the "Act"), by earning in excess of the rate of return for interstate access services prescribed by the Commission for the period January 1, 1987 through December 31, 1988. In addition, we award to Allnet damages and interest. For the reasons set forth below, we deny Allnet's complaint insofar as Allnet alleges that defendants included disallowable costs in their revenue requirements and denied Allnet equal access in violation of the Communications Act. In addition, we find that the record is not sufficient to rule on the issues of affiliate transactions and direct further proceedings as necessary to develop a full record upon which a decision can be made. Finally, we take no action here regarding whether Wisconsin Bell included impermissible excess deferred taxes in its rate base as this matter is the subject of a separate proceeding.

II. PRELIMINARY MATTERS

2. We first address an application for review (Application) filed by Allnet requesting that the Commission review certain portions of a Common Carrier Bureau (Bureau) order[2] that denied, in part, Allnet's first and second set of interrogatories.[3] Specifically, Allnet requests that we require Ameritech to answer Interrogatories 13 and 6 from its first set of interrogatories and its entire second set of interrogatories.

3. Interrogatory 13 requests that Ameritech identify all contacts between it and the Commission. The Bureau denied the request as not relevant to any allegations made in

[1] Defendants are: Illinois Bell Telephone Company (Illinois Bell), Indiana Bell Telephone Co., Inc. (Indiana Bell), Michigan Bell Telephone Co. (Michigan Bell), The Ohio Bell Telephone Co. (Ohio Bell), and Wisconsin Bell, Inc. (Wisconsin Bell) (collectively "Ameritech").

[2] Allnet Communication Services, Inc. v. The Bell Atlantic Tel. Cos., *et al.*, 7 FCC Rcd 4885 (Com. Car. Bur. 1992) (*Discovery Order*).

[3] Application at 1.

Allnet's complaint.[4] Allnet argues that the *ex parte* contacts of any party to a proceeding are clearly relevant to whether the disclosure procedures for a complaint process have been followed.[5] Allnet states that a failure to follow those procedures requires that the Commission or court correct damages that the *ex parte* contacts have caused.[6] Allnet contends that Ameritech received non-public information regarding an order holding these complaints in abeyance,[7] which was adopted on January 25, 1991.[8] Allnet alleges, in effect, that Ameritech had prior knowledge of the Bureau's decision to hold these complaints in abeyance and that this information formed the basis of Ameritech's request for an extension of time in which to file its answer to Allnet's complaint. Allnet further alleges that it has been harmed in that it was denied the opportunity to oppose the extension. Ameritech did not oppose Allnet's Application. In a letter to the Commission, however, Ameritech stated that on January 25, 1991 a representative of Ameritech contacted the Commission to inquire about reports that all the rate of return complaints were to be held in abeyance. Ameritech stated that a Commission representative stated that an order had been adopted with an effective date of January 25, 1991 holding these complaints in abeyance.[9]

4. We agree with the Bureau that Allnet's Interrogatory 13 seeks information regarding a matter that is outside the scope of these complaint proceedings. Moreover, Allnet has failed to show how it was prejudiced by the Bureau's action granting Ameritech's extension request. We note that communications relating to the status of a proceeding are permissible, even in restricted proceedings.[10] To the extent that Allnet believes a violation of the Commission's *ex parte* rules has occurred, it may properly raise this matter pursuant to the guidelines set forth in Sections 1.1200 - 1.1216 of the Commission's rules.[11]

5. Allnet's Interrogatory 6 requests that Ameritech "disclose how much in charges Ameritech's affiliates charged the Ameritech Operating Companies and, in turn, passed on the regulated revenue requirement.[12] Allnet argues that this interrogatory should have been granted because without this information it "will be unable to calculate how much of the overcharges were paid, and thus be unable to adjust the revenue requirement for the 1987-1988 period."[13] In addition, Allnet claims that its entire second set of interrogatories should be answered by Ameritech. Allnet argues that, while the Bureau found that its second set of interrogatories was repetitious and irrelevant, these interrogatories were intended to provide clearer inquiries as to certain issues. Allnet further contends that

> [g]iven that it filed its second set of interrogatories in a timely manner and that the total number of interrogatories were within the limits established by the Commission, Ameritech should be required to respond.....[14]

6. Allnet has not persuaded us that the Bureau erred in its determination that Interrogatory 6 and the second set of interrogatories were not reasonably calculated to lead to discovery of admissible evidence and were repetitious. Accordingly, we deny Allnet's Application.

III. RATE OF RETURN ISSUES

A. Background

7. The case presented by the complainant is virtually identical to that presented by the complainant in *MCI Telecommunication Corporation v. Pacific Northwest Bell Telephone Co., et al.*[15] In that proceeding, we held that LEC rates that produced earnings in excess of a Commission prescription were unjust and unreasonable within the meaning of Section 201(b) of the Act.[16] We also held that a complainant is entitled to recover damages to the extent that it can show that it suffered actual damage as a consequence of such violations. Subsequently, in the damages phase of the proceeding, we held that MCI had properly shown that it had been harmed by paying the defendants' rates that produced the excessive earnings and awarded the complainant monetary damages, plus interest computed at the IRS rate.[17]

8. A detailed accounting of the Commission's rate of return regulatory scheme as well as relevant Commission and court decisions is set forth in the *MCI Liability Order* and the *MCI Damages Order*[18] and will not be repeated at length here. However, a brief discussion of the development and implementation of the Commission's rate of return prescription is helpful to our analysis of the instant complaints.

9. Following the divestiture of the former Bell system and the concurrent development of the access charge system,[19] the Commission prescribed a rate of return system for all eight entities that emerged after divestiture (i.e.,

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[4] *Discovery Order*, 7 FCC Rcd at 4888, para. 28.
[5] Application at 3.
[6] *Id.*
[7] *See infra* n.29.
[8] Applications at 2.
[9] Letter dated February 11, 1991 from Michael T. Mulcahy (Ameritech Services) to Donna Searcy, Secretary, FCC.
[10] 47 C.F.R. § 1.1202(a).
[11] 47 C.F.R. §§ 1.1200 - 1.1216.
[12] Application at 4.
[13] *Id.*
[14] *Id.* at 5.
[15] 5 FCC Rcd 216 (1990) (*MCI Liability Order*), *recon. denied*, 5 FCC Rcd 3463 (1990) (*MCI Reconsideration Order*) (jointly "*MCI Orders*"), *appeal dismissed sub nom. Mountain States Tel. and Tel. Co., et al. v. FCC*, 951 F.2d 1259 (10th Cir. 1991) (per curiam). *See also*, American Telephone and Telegraph Co. v. Northwestern Bell Telephone Co., 5 FCC Rcd 143 (1990) (*AT&T Liability Order*), *appeal dismissed sub nom. Mountain States Tel. and Tel. Co., et al. v. FCC*, 951 F.2d 1259 (10th Cir. 1991) (per curiam).
[16] *MCI Liability Order* at 216-17. Section 201(b), 47 U.S.C. § 201(b), provides that "[a]ll charges, practices, classifications, and regulations for and in connection with . . . communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful."
[17] MCI Telecommunications Corporation v. Pacific Bell Telephone Company, *et al.*, FCC 93-70 (released February 8, 1993) (*MCI Damages Order*). *See also* AT&T Communications v. Northwestern Bell Telephone Company, 8 FCC Rcd 1014 (1993) (*AT&T Damages Order*).
[18] *MCI Liability Order*, 5 FCC Rcd at 217-18; *MCI Damages Order* at paras. 2-3.
[19] The Commission has prescribed for all local exchange carriers, including the defendants, a methodology known as the

AT&T and the seven Regional Bell Holding Companies) and approximately 1400 other local exchange carriers as well. In a broad rulemaking proceeding, the Commission adopted: (1) methodologies to be used to prescribe maximum rates of return; (2) procedures for represcribing rates of return on a regular basis; (3) a system of monitoring carriers' earnings; and (4) a requirement that overearnings be refunded, either directly to those who had paid rates that produced the overearnings, or pursuant to automatic, prospective adjustments to tariff rates.[20] For the two-year time period at issue in the instant complaints, January 1, 1987 through December 31, 1988, local exchange carriers, including the defendants, were required to file rates calculated to earn a 12 percent rate of return for overall interstate access.[21] In accordance with the Commission's allowance of a "buffer," carriers were given notice that 12.25 percent would be the maximum allowable rate of return on overall interstate earnings and that 12.40 percent would be the maximum allowable rate of return for any access service category.[22] The buffer,[23] would be used to determine whether the prescription had been violated.[24]

10. In January 1988, the U.S. Court of Appeals for the District of Columbia Circuit set aside the automatic refund mechanism as arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce."[25] The court acknowledged, however, that "the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate of return prescription." [26]

11. In February 1988, MCI filed formal complaints against a number of LECs alleging violations of the Commission's rate of return prescription for the October 1, 1985 through December 31, 1986 monitoring period and requesting monetary damages. Allnet filed similar complaints in September 1989, also seeking damages for alleged rate of return prescription violations for the initial 1985-1986 monitoring period. During the same time period, numerous similar complaints were filed by other interstate access customers alleging rate of return prescription violations for the initial 15-month monitoring period.[27] In January 1990, the Commission released its *MCI Liability Order* granting MCI's complaints and directing MCI to file supplemental complaints for damages. On November 28, 1990, Allnet filed additional complaints alleging, *inter alia,* violations of the Commission's prescription for the January 1, 1987 through December 31, 1988 monitoring period by the defendants.[28] In October 1991, the Commission placed all pending rate of return complaints, including MCI ssupplemental complaints for damages, in abeyance pending resolution of a related court remand in *Illinois Bell Tel. Co. v. FCC.* [29] In July 1992, the Bureau released an order resolving certain discovery issues and establishing further discovery and briefing schedules

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"access charge system," which carriers are required to follow in tariffing their interstate services. The system determines, *inter alia,* the carriers' overall rate structure and the allocation of costs within that structure, and was in effect during the period covered by the complaints. The access charge system is codified in Part 69 of the Commission's rules. *See* 47 C.F.R. § 69.1 *et seq.* These rules were developed in a proceeding that was the subject of numerous challenges on appeal. With a few exceptions not relevant to the instant complaint proceedings, these appeals were denied by the D.C. Circuit. *See NARUC v. FCC,* 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied,* 469 U.S. 1227 (1985).

[20] *See* Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Carriers, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985), (Phase I Order), *on reconsideration,* Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,033 (Apr. 1, 1986) (Phase I Reconsideration); *on further reconsideration,* 2 FCC Rcd 190 (1987). *See also* Procedures and Methodologies to Establish Reporting Requirements, CC Docket No. 86-127, FCC 86-514 (released Dec. 3, 1986), 52 Fed. Reg. 273 (Jan. 5, 1987).

[21] *See* Authorized Rate of Return for the Interstate Access Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase III, FCC 86-354, 51 Fed. Reg. 32,920 (Sept. 17, 1986) (*Phase III Order), recon. denied,* 2 FCC Rcd 5636 (1987). *See also* Procedures and Methodologies to Establish Reporting Requirements, CC Docket No. 86-127, FCC 86-514 (released Dec. 3, 1986), 52 Fed. Reg. 273 (Jan. 5, 1987).

[22] 47 C.F.R. § 65.700.

[23] *See MCI Liability Order,* 5 FCC Rcd at 217:

> . . . the Commission established both an authorized rate of return and a 'spread' or 'buffer' above that return for use in proceedings relating to the enforcement of the prescription. In other words, the authorized return would be employed in computing tariff rates; the spread, or buffer, would be used in combination with the authorized return 'to determine whether a rate of return prescription had been violated.' [footnote omitted.]

[24] *See Phase I Order,* 50 Fed. Reg. at 41,352 (para. 21).

[25] American Tel. & Tel. Co. v. FCC, 836 F.2d 1386, 1390 (D.C. Cir. 1988) (*AT&T v. FCC).* For a detailed discussion of *AT&T v. FCC, see MCI Liability Order,* 5 FCC Rcd at 221-23.

[26] *AT&T v. FCC,* 836 F.2d at 1392.

[27] These additional complaints are being dealt with in separate Section 208 complaint proceedings.

[28] The Commission has adopted a memorandum opinion and order resolving Allnet's complaints covering the initial 1985-1986 monitoring period. *See* Allnet Communication Services, Inc. v. The Diamond State Tel. Co., *et al.,* FCC 93-59 (adopted January 29, 1993).

[29] 911 F.2d 776 (D.C. Cir. 1990) (*Illinois Bell I).* *See* Allnet Communication Services, Inc. v. The Diamond State Tel. Co., *et al.,* 6 FCC Rcd 645 (Com. Car. Bur. 1991) (*Abeyance Order).* In February 1991, the Bureau vacated the *Abeyance Order* with respect to the captioned complaints because "the captioned proceedings raise issues in addition to those directly affected by the [c]ourt's remand." *See* Allnet Communication Services, Inc. v. Illinois Bell Tel. Co., *et al.,* 6 FCC Rcd 980 (Com. Car. Bur. 1991). The Commission acted on the remand in October 1991. *See* Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, CC Docket No. 86-497, 7 FCC Rcd 296 (1991) (*Remand Decision), appeal docketed sub nom. Illinois Bell Telephone Co., et al. v. FCC,* No. 91-1020 (D.C. Cir. Jan. 11, 1991).

Ameritech filed a motion to, among other things, hold these complaints in abeyance pending the Commission's action on the remand in *Illinois Bell I.* Because we have acted on the remand, Ameritech's motion is moot and is dismissed.

for these proceedings.[30] Pursuant to the *Discovery Order*, the parties submitted briefs and reply briefs setting forth their respective claims and arguments.[31]

B. Discussion

1. Liability For Damages

a. Contentions of the Parties

12. Allnet alleges that the rates it paid for certain of the defendants' interstate access services during the period from January 1, 1987 through December 31, 1988 were unjust and unreasonable in violation of Section 201(b) of the Act.[32] Allnet supports its allegations with evidence taken from reports filed with the Commission by the defendants for the two-year period at issue that show that defendants achieved earnings in excess of the Commission's prescribed rate of return on one or more of the three interstate access categories established for the purpose of enforcing that rate of return prescription.[33]

13. Allnet requests that the Commission declare that the defendants' charges for the period from January 1, 1987 through December 31, 1988 are in violation of the rate of return prescription and Section 201(b) of the Act, and order the defendants to pay damages to Allnet equal to the difference between the amount actually paid by Allnet for interstate access service during the period and the amount that Allnet would have paid if the defendants' charges earned no more than the maximum allowable rate of return, plus interest at the amount specified in CC Docket No. 84-800. In its brief, however, Allnet requests that interest be calculated at 15%, the alleged cost of money to Allnet.

14. Defendants advance a variety of arguments that Allnet has failed to state a cause of action under the Act and that Allnet's claims are barred by *American Telephone and Telegraph v. FCC*[34] and *Ohio Bell*, which was issued after the release of the *MCI Liability Order*. Ameritech argues that our reasoning in the *MCI Liability Order* is flawed and contrary to *AT&T v. FCC* and *Ohio Bell*. Specifically, Ameritech argues that changing from an automatic refund structure to a complaint structure does not cure the inconsistencies the courts found with respect to the automatic refund rule.[35] Additionally, Ameritech argues that it is contrary to *AT&T v. FCC* and *Ohio Bell* to find a rate of return violation when aggregated overall earnings for interstate access service did not exceed 12.25 percent regardless of access category earnings in excess of 12.40 percent by the individual companies.[36] Ameritech contends that these propositions are not narrowly confined to the Commission's ratemaking activities under Sections 204-205 of the

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[30] *Discovery Order*, 7 FCC Rcd 4885 (Com. Car. Bur. 1992). Allnet and Ameritech served interrogatories on each other on August 10, 1992 to which they responded on August 31, 1992 and September 1, 1992, respectively. In addition, on August 10, 1992, Ameritech filed a Motion to Serve Request for Production of Documents (accompanied by a Request for Production of Documents) (Motion), which Allnet opposed. While there is disagreement over the calculation of damages, Allnet and Ameritech do not dispute the underlying amounts (e.g., the amounts billed to Allnet) upon which their damages calculations are based. Accordingly, we dismiss Ameritech's Motion. On June 28, 1991, Allnet filed a Motion to Strike Ameritech's reply in these proceedings. Alternatively, Allnet asked that it be allowed to file a reply to Ameritech's reply. Ameritech opposed the Motion to Strike; Allnet replied. We will dismiss the motion to strike as moot. Both parties have had ample opportunity to present their arguments and respond to each other's arguments in the briefs and reply briefs filed in these proceedings.

[31] Allnet filed its brief on September 21, 1992 with a corrected brief filed on September 24, 1992 (Allnet Br.). Ameritech filed its brief on September 21, 1992 (Ameritech Br.). Allnet filed its reply brief on October 5, 1992 (Allnet RBr.). Ameritech filed its reply brief on October 1, 1992 (Ameritech RBr.).

[32] 47 U.S.C. § 201(b).

[33] The interstate access service categories are special access, common line, and switched traffic sensitive. *See* 47 C.F.R. § 65.702(b). Allnet states that the monitoring reports recite that for the period January 1, 1987 through December 31, 1988, Indiana Bell earned a rate of return of 14.81% in the switched traffic sensitive category; Michigan Bell earned rates of return of 15.09% in the switched traffic sensitive category and 12.59% in the common line category; Ohio Bell earned rates of return of 13.27% in the special access category and 12.73% in the switched traffic sensitive category; and Wisconsin Bell earned a return of 14.00% in the special access category. We note that Allnet also has listed in para. 9 to its complaints the categories in which defendants underearned and that Illinois Bell underearned in each access category.

[34] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*). The court invalidated the Commission's procedure to enforce its rate of return prescriptions through automatic refunds of carrier overearnings to customers. For a detailed discussion of *AT&T v. FCC*, *see MCI Liability Order*, 5 FCC Rcd at 221-23. The Court of Appeals for the Sixth Circuit, relying on *AT&T v. FCC*, vacated a Commission order that dealt with refunds of earnings in excess of the authorized rate of return for the special access category over a period of years in the context of a strategic pricing investigation. *See Ohio Bell Telephone Company v. FCC*, 949 F.2d 864 (6th Cir. 1991) (*Ohio Bell*). The court primarily relied upon the statement from *AT&T v. FCC* that a rate of return prescription is both a minimum and a maximum prescription. *See AT&T v. FCC*, 836F.2d at 1390. The Commission has clarified, however, that it does not view a rate of return prescription as both a maximum and a minimum and has stated that

> [o]ur accumulated experience with rate of return prescriptions, and our review of the cost of capital evidence in this proceeding, convince us that there is no such point. *** We believe there is a substantial gap between an earnings level that is fully adequate to assure attraction of capital on favorable terms, and an earnings level which, if sustained over time, would be confiscatory.

Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, 5 FCC Rcd 7507, 7532 (1990), *appeal docketed sub nom. Illinois Bell Telephone Co., et al. v. FCC*, No. 91-1020 (D.C. Cir. Jan. 11, 1991).

[35] Ameritech Br. at 11.

[36] *Id.* at 11-12. Extending this argument even further, Ameritech contends that the key rate of return with which Allnet should be concerned is the overall earnings of Ameritech in the aggregate, not the individual categorical earnings of Ameritech's subsidiaries. In the aggregate, Ameritech earned less than 12.25%. *Id.* at 12-13. Ameritech is the parent holding company of Illinois Bell, Indiana Bell, Michigan Bell, Ohio Bell, and Wisconsin Bell. We have previously rejected this argument. *See AT&T Damages Order*, 8 FCC Rcd at 1021, para. 23., citing *AT&T Liability Order*, 5 FCC Rcd at 148, para. 47.

Act[37] but are equally applicable when the Commission decides individual complaints for damages under Section 208 of the Act.[38]

15. Ameritech also argues that rates in question were prescribed by the Commission and are not subject to refund or damages claims.[39] Defendant further argues, relying on *Illinois Bell I*, that the monitoring reports inaccurately represent Ameritech's return on investment.[40]

16. Ameritech argues that Allnet's claims for damages relating to services received prior to November 30, 1988 are barred by Section 415 of the Act,[41] which establishes a two-year statute of limitations on the filing of complaints.[42] According to Ameritech, Section 415 bars recovery of any damages if sought more than two years after the alleged overearning.

b. Discussion

17. We have carefully examined the record before us and conclude that defendants have cited no facts and have made no arguments here that would warrant a ruling contrary to the *MCI Orders*. We are not persuaded that our reasoning in the *MCI Liability Order* is contrary to *AT&T v. FCC* and *Ohio Bell*. Rather, we are persuaded that our decision in the *MCI Liability Order* complies with all applicable law.

18. *Failure to State a Cause of Action:* In the *MCI Liability Order*, we rejected identical claims and held that *AT&T v. FCC* establishes no precedent that bars an individual complainant from seeking a remedy under Section 208 of the Act for damages based on a carrier's reported overearnings.[43] We stated that

> we are not persuaded by the defendants' claims that earning in excess of a prescribed rate of return does not violate that Act or, if it does, that the Commission *is required* to take a carrier's underearnings as well as its overearnings into account in determining whether a violation has occurred.
>
> * * * * * * *
>
> We find that a valid prescription bound the defendants to a maximum earnings limitation, and the defendants admit that they earned in excess of that amount during the period in question.[44]

We found further that *AT&T v. FCC* did not pertain to Section 208 complaint proceedings. The Commission has the authority to order a carrier to pay damages if a complainant meets the burden of establishing both a violation of the Act and the actual injury.[45]

19. *AT&T v. FCC and Ohio Bell:* We disagree with the defendant's claim that *Ohio Bell* and *AT&T v. FCC* compel us to dismiss Allnet's complaints. As we emphasized in the *MCI Liability Order* and reaffirmed in the *MCI Damages Order*, automatic refunds and refunds ordered under Section 204 of the Act are different from individual actions for damages under Section 208. Unlike the automatic refund mechanism in *AT&T v. FCC* or the refund procedure in *Ohio Bell*, both of which resulted from rulemaking proceedings initiated at the Commission's discretion, individual actions for damages under Section 208 are initiated by private parties seeking damages for injuries to themselves; those private parties have the burden of establishing both a violation of the Act and actual injury.[46] The courts in *AT&T v. FCC* and *Ohio Bell* did not discuss private complaints for damages; they did not invalidate private actions for damages; and their analysis is not applicable to the different separately authorized complaint procedure set forth in Sections 206-209. Accordingly, those decisions do not require us to depart from our holding in the *MCI Liability Order* that defendant has violated the Act by earning in excess of a valid rate of return prescription, thereby making its rates unjust and unreasonable under Section 201 of the Act and itself liable for damages to the extent a complainant can establish that it was damaged as a result of the violation.[47]

20. *Rates Prescribed by the Commission:* Ameritech's argument that the complaints are barred because the rates in effect during the period in question were prescribed by the Commission was discussed at length and rejected in the *MCI Liability Order* and requires no further discussion here.[48] Ameritech has raised no new issues or set forth arguments that would persuade us to depart from our holdings.

21. *Illinois Bell I:* We also reject defendants' claim that the decision in *Illinois Bell I* renders the information contained in their Forms 492 unreliable. In *Illinois Bell I*, the D.C. Circuit Court remanded for further consideration, *inter alia*, the issue of whether non-cash expenses should be excluded from our determination of the cash working capital allowance. In the *Remand Decision*, we found that our cash working capital allowance was properly calculated.[49] Therefore, we find this argument to be an impermissible collateral attack on a prior Commission determination.

22. *Statute of Limitations:* Allnet is correct in its assertion that it could file its complaints until two years after defendants filed their final monitoring reports with the Commis-

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[37] 47 U.S.C. §§ 204-205.
[38] Ameritech Br. at 7-13.
[39] *Id.* at 13-16.
[40] *Id.* at 17-18.
[41] Section 415 provides, in pertinent part, that "[a]ll complaints against carriers for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after...." 47 U.S.C. § 415(b) (1982). The term "overcharges" is defined in Section 415 "to mean charges for services in excess of those applicable thereto under the schedules of charges lawfully on file with the Commission." 47 U.S.C. § 415(g) (1982).
[42] Ameritech Br. at 16-17.
[43] *MCI Liability Order*, 5 FCC Rcd at 222-23.
[44] *Id.*, 5 FCC Rcd at 223 [emphasis in the original].
[45] *Id.*
[46] *See id.*, 5 FCC Rcd at 222-23.
[47] *See id.*, 5 FCC Rcd at 226.
[48] *Id.* at 222-23, para. 55.
[49] 7 FCC Rcd at 299.

sion.[50] We have previously held that the date of the filing of the final monitoring report is the date a complainant discovers the right or wrong or the facts on which such knowledge is chargeable as a matter of law. [51] Defendants have made no argument that persuades us to alter this holding. Section 415 does not bar Allnet's complaints.

2. Damages and Interest Claims

23. Allnet's damages claims rest primarily on the contention that the proper measure of damages it incurred as a result of the defendants' rate of return prescription violations is the difference between the amounts it actually paid the defendants for interstate access services during the January 1, 1987 through December 31, 1988 monitoring period and the amount it would have paid if the defendants' rates produced earnings that did not exceed the Commission's prescription. The defendants, however, have raised a number of challenges to Allnet's damages claims, including a number of arguments that were previously considered and rejected by the Commission in the *MCI Liability Order* and the *MCI Damages Order*. We address the parties' pertinent contentions below.

a. Damages

i. Contentions of the Parties

24. Allnet's damages claims rest primarily on the contention that the proper measure of the damages it incurred as a result of defendants' violations is the difference between the amount it actually paid defendants for interstate access services during the January 1, 1987 through December 31, 1988 period and the amount it would have paid if the defendants' rates had produced earnings that did not exceed the Commission's prescribed rate of return.[52] In the *Discovery Order*, the Bureau stated that it tended to agree, in principle, that a possible measure of the damages stemming from defendants' rate of return violations could be that difference.[53] The Bureau was not persuaded on the record before it, however, that a damages determination based solely on such a measure necessarily reflected actual damages incurred by Allnet.[54] The defendants were invited to submit evidence that could serve to mitigate or otherwise reduce Allnet's damages claims. Specifically, the Bureau stated that evidence that would show that Allnet's share of excessive earnings realized in a particular access category by a defendant could be offset or otherwise reduced due to facts and circumstances surrounding Allnet's purchase of other interstate access services from such defendant for the relevant monitoring period might be relevant.[55]

25. Under its approach to calculating the damages, Allnet states that it should be awarded damages of $309,000 from Indiana Bell, $923,000 from Michigan Bell, $128,000 from Ohio Bell, and $48,000 from Wisconsin Bell, exclusive of interest.[56] Allnet states that the data underlying these calculations is taken from the defendants' FCC Forms 492, responses to discovery, and other filings in these proceedings.[57] Although Allnet does not specifically describe its method in computing its damages, it does provide a chart providing its figures and its calculations. [58] To derive the stated amounts, Allnet first calculates for each access service category, the amount by which a defendant's earnings exceeded the rate of return prescription of 12 percent plus the .40 percent buffer. This is accomplished by multiplying the defendant's rate base by the difference between the defendant's actual rate of return (from the defendant's FCC Form 492) and the maximum allowable rate of return (including the .40 percent buffer) and then dividing that amount by .5.[59] Next, Allnet computes its percentage share of the defendant's revenues for each access service category by dividing the amount billed per category to Allnet by defendant's revenues per access category.[60] Using this percentage, Allnet then computes its monetary share of the overearnings in a particular access category by multiplying the Allnet percentage of the defendant's revenues by the amount of overearnings for a particular category.[61] Next, Allnet adjusts this amount for the effect of taxes.[62] Allnet contends that it is entitled to interest on the damages amounts at 15%, which yield awards of $471,000 from Indiana Bell, $1,407,000 from Michigan Bell, $164,000 from Ohio Bell, and $73,000 from Wisconsin Bell prior to

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[50] Allnet Reply and Opposition to Affirmative Defenses (filed June 27, 1991) at p.9. Ameritech filed its final monitoring reports for the 1987-1988 monitoring period on September 29, 1989. *See* Allnet Complaint at Exhibit 1.

[51] *MCI Liability Order*, 5 FCC Rcd at 225

> the defendants filed the rate of return monitoring reports which... were developed by the Commission for several purposes, including making information about carrier earnings public[ly] available. Moreover, the monitoring reports relied on by MCI in its complaints were specifically designated by the Commission as a "final" and conclusively binding determination of a carrier's earnings.

We note further that we have held that Section 415(e) is inapplicable to the type of complaints we deal with herein. Section 415(e) concerns a carrier's liability to its customers for failure to transmit a message in accordance with its common carrier obligations. The instant complaints deal with the lawfulness of defendants' rates, not defendants' transmissions or obligations to transmit messages properly. *See MCI Reconsideration Order*, 5 FCC Rcd at 3464.

[52] In support of what it characterizes as the traditional approach to damages, Allnet cites to *Southern Pacific Co. v. Darnell-Taenzer Co.*, 245 U.S. 531 (1918) (*Darnell-Taenzer*) and the cases that followed this decision. Allnet RBr. at 15. In *Darnell-Taenzer*, the Court upheld an Interstate Commerce Commission (ICC) order requiring a carrier to pay reparations to a shipper in the amount that the rate charged by the carrier exceeded a rate found reasonable by the ICC.

[53] *Discovery Order*, 7 FCC Rcd at 4886, para. 7.

[54] *Id.*

[55] *Id.*

[56] These amounts, calculated by Allnet, do not reflect a 15 percent "cost of money" charge that Allnet claims it is due.

[57] Allnet Br. at 2, 6.

[58] *See, e.g.*, Allnet RBr. Attachment 1.

[59] Allnet RBr. Attachment 1, line 4.

[60] *Id.*, Attachment 1, line 7. Allnet relies on information provided by Ameritech in its interrogatory responses for "Total Billed Revenues" and "Allnet Billed Revenues."

[61] *Id.*, Attachment 1, line 8.

[62] *Id.*, Attachment 1, line 9. Allnet uses the effective tax rates provided by defendants.

taking into account any offsets. Applying offsets of Allnet's share of underearnings in categories that earned below 12.00%, Allnet then claims total damages, including interest, of $286,000 from Indiana Bell, $894,000 from Michigan Bell, $164,000 from Ohio Bell, and $27,000 from Wisconsin Bell.[63]

26. The defendants challenge Allnet's damages claims on a number of grounds, raising several arguments that were previously considered and rejected by the Commission in the *MCI Liability Order* and the *MCI Damages Order*. Defendants maintain that complainant seeks a refund and to have the Commission effectively reinstate its refund rules, a result precluded by *AT&T v. FCC* and *Ohio Bell*.[64] Defendants next contend that Allnet's damages claims still fail because Allnet has failed to show that it sustained actual damage as a result of defendants' rates.[65] Furthermore, defendants argue, Allnet can not prove actual damages because, as a price taker, Allnet would have had to pass on any savings from lower Ameritech rates to its customers in the form of lower rates.[66]

27. Further, Ameritech argues that any award of damages to Allnet should be reduced by the amount of Ameritech's underearnings in other access service categories in which Allnet took service.[67] Defendants argue that *AT&T v. FCC* and *Ohio Bell*, as well as the equities of the situation, require such offsets.[68]

28. Allnet counters that defendants' threshold arguments regarding the effect of the court's ruling in *AT&T v. FCC* and *Ohio Bell* are inapposite and have largely been rejected or precluded by the *MCI Liability Order*.[69] Allnet adds that defendants' arguments that it has failed to allege and prove violations of the Act and actual damages are unfounded because it has made a sufficient showing of each under traditional principles governing its statutory right to such relief.[70] According to Allnet, the only injury and causation it need show are the injury and causation arising from its payment of excessive rates for services it purchased from defendants during the relevant period. Allnet maintains that it has shown that defendants charged rates that produced earnings in excess of the Commission's prescribed rate of return and argues that its damages are the excessive charges that Allnet paid. Moreover, Allnet claims that the burden is on defendants to show that the full overcharges should not be recovered as damages and that they have failed to meet this burden.[71]

ii. Discussion

29. *AT&T v. FCC and Ohio Bell:* The defendants' claims that the holdings in *AT&T v. FCC* and *Ohio Bell* control these proceedings and bar an award of damages to Allnet are without merit for the reasons stated in the *MCI Liability Order*. We emphasized in that Order that the court in *AT&T v. FCC* explicitly acknowledged the Commission's authority to order a carrier to disgorge earnings in excess of a rate of return prescription,[72] finding only the remedy component of the Commission's rate of return prescription (the automatic refund mechanism) to be unlawful.[73] More to the point, we emphasized that "the [*AT&T v. FCC*] opinion does not address Section 208 complaint proceedings nor purport to alter the statutory scheme of the Act or the remedies Congress established therein."[74] Similarly, as we stated in the *MCI Damages Order*, the *Ohio Bell* decision does not expand upon *AT&T v. FCC* and does not address the Commission's authority to award damages in private complaint actions under Section 208 of the Act.[75]

30. *Illinois Bell II:* We also reject defendants' claim that the decision in *Illinois Bell II* somehow leaves the Commission only with Section 205 authority in the face of a violation of our rate of return prescription. As we explained in the *MCI Damages Order*, *Illinois Bell II* addresses

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[63] Allnet also provides calculations for damages with adjustments for amounts it contends should have been excluded from defendants' rate bases (excess deferred taxes, litigation and lobbying expenses, and overcharges for affiliate transactions). These issues are discussed below.

[64] Ameritech Br. at 21. Defendants further contend that *Illinois Bell Telephone Company v. FCC*, 966 F.2d 1478 (D.C. Cir. 1992) (*Illinois Bell II*) bars the Commission from ordering a refund unless it has complied with the procedures identified in Section 204 of the Act. *Id.* at 21-22. Defendants' reliance on *Illinois Bell II* is misplaced. This proceeding involves a claim for damages under Section 208, not a refund under Section 204. Therefore, *Illinois Bell II* is inapplicable.

[65] *Id.* at 19-20. Ameritech cites to *Southern Ry. Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 454-55 (1979) (*Seaboard*) to support its argument that Allnet may only recover actual damages rather than the full amount of the overcharge. While it is true that a complainant in a Section 208 proceeding may only recover actual damages, we note that *Seaboard*, however, does not stand for the proposition that refunds for overcharges and an award of damages are always necessarily two different amounts. In fact, the Court acknowledges that these amounts may be identical. *See* 442 U.S. 444, 455, n.8.

[66] Ameritech Br. at 20-21.

[67] *Id.* at 22-23. Defendant offers its earnings of 6.03% by Michigan Bell in the special access category as an example.

[68] *Id.* at 22.

[69] *See* Allnet RBr. at 4. First, Allnet states that the instant proceeding is a complaint case for damages under Sections 206-209 of the Communications Act and not an automatic refund case as considered in *AT&T v. FCC* and *Ohio Bell*. Allnet RBr. at 6. Second, Allnet contends that unlike the schemes considered in *AT&T v. FCC* and *Ohio Bell*, Allnet is seeking access category overearnings while the defendants have the opportunity to show offsetting category underearnings. *Id.* Third, Allnet argues that the premise of the automatic refund cases that the rate of return prescription is both a maximum and a minimum for refund purposes is incorrect in this situation. Allnet states that it is only seeking damages based on overearnings on access services it purchased from defendants, while affording the opportunity for defendants to offset overearnings with underearnings in other access categories. *Id.* at 4, 6-7.

In its brief, Allnet incorporates by reference the arguments with regard to the damages issues made by MCI Telecommunications Corp. in MCI Telecommunications Corp. v. Pacific Bell Tel. Co., *et al.*, File Nos. E-88-46s, E-88-44s, E-88-51s, and E-88-54s. *See* Allnet Br. at 7, n.6.

[70] Allnet RBr. at 15.

[71] Allnet disputes Ameritech's argument that if Ameritech had charged lower rates to AT&T, Allnet would have to have lowered its rates in correspondence to lower AT&T rates. *Id.* at 13-14.

[72] *AT&T v. FCC*, 836 F.2d at 1392 ("Thus, as we previously have concluded, the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate of return prescription.").

[73] Indeed, the court in *Ohio Bell* recognized the continuing efficacy of our rate of return framework. *See* 949 F.2d at 868.

[74] *MCI Liability Order*, 5 FCC Rcd at 223, para. 56.

[75] *MCI Damages Order* at para. 26.

the Commission's authority under Section 204, not Section 208.[76] The defendants' claim that the *Illinois Bell II* decision deprives the Commission of authority to award damages for violations of a valid rate of return prescription has no merit.

31. *Section 201(b) of the Act:* We turn now to the defendants' contention that Allnet's damages claims must be dismissed because Allnet has failed to prove defendants' rates were unjust and unreasonable within the meaning of Section 201(b) of the Act. In the liability section above, we held that the complainant met its burden of proof by establishing that the defendants violated our rate of return prescription.[77] Accordingly, the question before us now is not whether defendants' rates were unjust and unreasonable; rather the question now is whether the complainant suffered any measurable damage as a consequence of paying rates previously determined by the Commission to be unlawful under Section 201(b).[78]

32. *Damages and Offsets:* The defendants' arguments are devoted primarily to attempting to persuade the Commission that Allnet's damages claims are really claims for restitution or refunds governed by equitable or public policy considerations. These considerations, according to defendants, militate against any award of damages to Allnet based on excessive earnings. The defendants argue, in effect, that the damages Allnet seeks are equivalent to refunds that would have been required under the refund mechanism invalidated by the court in *AT&T v. FCC*. We do not agree. We are concerned here with determining whether a particular customer, which has availed itself of a statutory complaint remedy under Title II of the Act, has sustained any measurable damage that can be traced to defendants' violations of the Act. Although a damages award under Section 208 of the Act might well be equal or substantially similar to a refund ordered under Section 204 of the Act,[79] this does not transform a private complaint action into a public enforcement proceeding subject to broad public interest considerations.

33. As in the *MCI Damages Order*, we find defendants' arguments with respect to "passing-on" equally unavailing. In rejecting this same argument, we said, "[w]hether [complainant] passed on the overcharges or absorbed them does not alter the fact that the defendants overcharged [complainant] in violation of a binding rate of return prescription and must answer for such violations."[80] The issue is not what Allnet has done in response to paying excessive rates, but whether Allnet has been damaged as a result of these excessive rates.[81]

34. Nor can we accept the defendants' related claim that we should require Allnet to flow through any damages it may receive to its end user customers. Sections 206-209 of the Act give private parties the right to file complaints challenging the acts or omissions of carriers and to recover monetary damages resulting from such acts or omissions. Complainants, however, are charged, as Allnet is in the instant case, with the burden of establishing violations of the Act or Commission rule or order and the amount or extent of damage suffered as a consequence of such violations. Accepting defendants' flow through argument would, in effect, transform Allnet's complaints into class action suits on behalf of its customers, a result neither expressly contemplated by nor consistent with the private remedy created under Sections 206-209 of the Act.

35. We have carefully reviewed the arguments and evidence presented by the parties and believe that some offsets to the claimed damages amounts are appropriate. In the *MCI Liability Order*, we specifically rejected claims by the defendants that the Commission is required to take a carrier's interstate access underearnings as well as overearnings into account in determining whether a violation of the Act has occurred because this would be at odds with established case law.[82] However, we stated in the *MCI Damages Order* that it is appropriate to consider defendants' underearnings in assessing complainant's damage or injury resulting from defendants' overearnings in a particular monitoring period.[83] The parties have made no argument which persuades us to alter our holdings.

36. We note that there is no disagreement between Allnet and Ameritech concerning the total billed revenues, amounts billed to Allnet, Allnet's market share, and effective tax rates.[84] Ameritech argues that Allnet is in error when its applies interest to overpayments prior to offsetting underpayments.[85] In addition, Ameritech argues that underearnings should be calculated at 12.40% rather than at the 12.00% used by Allnet because the Commission allowed a maximum 12.40% rate of return on category earnings during the 1987-1988 monitoring period.[86]

37. We accept Allnet's calculations of both Ameritech's underearnings and overearnings on the category level.[87] We agree that interest may not be assessed until undercharges

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[76] *Id.* at para. 27.

[77] In the *MCI Liability Order*, we held that the complainant therein could prove that defendants' rates were unjust and unreasonable by proving that the defendants violated our rate of return prescription. *See MCI Liability Order*, 5 FCC Rcd at 226.

[78] Allnet's contention that Ameritech, by settling with other rate of return complainants, has discriminated in violation of Sections 202(a) and 203 of the Act, 47 U.S.C. § 202(a) and 203, is also unavailing. Allnet has provided no authority for its contention that Section 202 of the Act governs the terms and manner of a carrier's resolution of Section 208 disputes with its customers or that such settlements result in unlawful rebates under Section 203 of the Act.

[79] *See Seaboard*, 442 U.S. 444, 455, n.8:

> If a shipper proves a rate is unreasonable and that he was damaged in the full amount he was overcharged, the outcome of a § 13(1) [§ 208] proceeding will be no different than that of a § 15(8)(a) [§ 204] proceeding in which the carrier fails to establish the reasonableness of the rate.

[80] *MCI Damages Order* at para. 31.

[81] While defendants have asserted that lower charges to complainant would have resulted in lower charges to complainant's customers, they have provided no persuasive evidence in support of this contention.

[82] *MCI Liability Order*, 5 FCC Rcd at 223, paras. 59-60, citing *Nader v. FCC*, 520 F.2d 182, 201 (D.C. Cir. 1975). *See also New England Tel. & Tel. Co. v. FCC*, 826 F.2d 1101 (D.C. Cir. 1987), *cert. denied*, 490 U.S. 1039 (1989); and *AT&T v. FCC*.

[83] *MCI Damages Order* at para. 38.

[84] *See* Allnet RBr. at Attachment I and Ameritech Answer to Interrogatories (filed September 1, 1992) at Attachments 1-5.

[85] Ameritech RBr. at 8.

[86] *Id.* at 8-9.

[87] These calculations are contained in Attachment I to Allnet's

are offset against overcharges to determine the amount of damages. We agree with Allnet that 12% is the benchmark for determining underearnings. A carrier can not be said to have underearned to the extent that it earned more than the target rate of return of 12.00%. Based upon our decision regarding the computation of damages herein, we award damages to Allnet of $124,280 from Indiana Bell,[88] $409,339 from Michigan Bell,[89] $128,746 from Ohio Bell,[90] and $2,385 from Wisconsin Bell.[91]

b. Interest

i. Contentions of the Parties

38. Defendants' final claim is that Allnet is not entitled to prejudgment interest should the Commission award damages to Allnet. Ameritech argues that, while the Commission may award interest when ordering refunds under Section 204 of the Act, no such provision exists for awarding interest under Section 206 of the Act.[92] Ameritech concedes that the Commission has considerable discretion in deciding whether to award prejudgment interest in a complaint proceeding.[93] Defendants further state that in awarding interest the Commission is guided by considerations of fairness. Therefore, defendants argue that fairness suggests that interest should not be awarded in these proceedings. Specifically, defendants contend that they did not unilaterally decide to withhold money from Allnet and did not intentionally target their rates to produce overearnings. Moreover, they argue, interest is not necessary to make Allnet whole, and the amount of damages was not certain.[94]

39. Allnet argues that defendants fail to recognize that Section 206 of the Act provides for the awarding of prejudgment interest. Allnet contends that it was damaged because the overcharges denied it use of money that otherwise would have been available, therefore warranting the award of interest at the rate of Allnet's cost of money.[95]

ii. Discussion

40. Defendants' claim that the Commission lacks the requisite authority to award interest in a Section 208 common carrier complaint proceeding has no merit. Although an award of interest does not fall squarely within the ambit of Section 208 of the Act, our authority under Sections 4(i) and other sections of the Act to award interest in a common carrier complaint case is well established.[96] In deciding whether to award interest in a particular common carrier complaint case we are generally guided by federal court practice, where the award of prejudgment interest "... is a matter left to the sound discretion of the trial court."[97] The award of interest in a common carrier complaint case is thus guided by considerations of fairness. Applying this standard, we are persuaded that an award of interest is appropriate in this case. Allnet was effectively deprived of the use of the excessive amounts it paid the defendants as a result of their unlawful rates while the defendants, on the other hand, enjoyed the beneficial use for a substantial period of time of funds to which Allnet rightfully has a claim. We are persuaded that interest is required not only to effect a full and fair remedy for Allnet, who paid rate higher than it would have paid had defendants earned within the prescribed level, but also to avoid any unjust enrichment of defendants stemming from their charging rates that we have determined to be unjust and unreasonable under Section 201(b) of the Act.[98] However, we reject Allnet's claim that the appropriate rate of interest is its alleged 15% "cost of money." Allnet has provided no persuasive argument to support its claim that its cost of money is the proper measure of interest. Consistent with our decision in the *AT&T Damages Order*,[99] we also hold that the interest rate set forth in the CC Docket No. 84-800 proceeding[100] is inappropriate in the instant proceeding. Just as the courts' decisions regarding the validity of the rate of return mechanism and refunds under Section 204 of the Act do not guide us in this Section 208 proceeding, we are similarly not bound by interest rate computations

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Brief. Allnet calculated overearnings above 12.40% and underearnings below 12.00%. We have adjusted the computations to take into account the rounding off of numbers by Allnet.

[88] This amount is calculated as follows:

$	308,677	(overcharges - switched traffic sensitive category)
-	184,397	(undercharges - special access category)
$	124,280	Damages

[89] This amount is calculated as follows:

$	65,830	(overcharges - common line category)
+	857,025	(overcharges - switched traffic sensitive category)
-	513,516	(undercharges - special access category)
$	409,339	Damages

[90] This amount is calculated as follows:

$	66,277	(overcharges - switched traffic sensitive category)
+	62,469	(overcharges - special access category)
$	128,746	Damages

[91] This amount is calculated as follows:

$	47,602	(overcharges - special access category)
-	45.217	(undercharges - switched traffic sensitive category)
$	2,385	Damages

[92] Ameritech Br. at 24.

[93] *Id.*

[94] *Id.* at 25.

[95] Allnet RBr. at 17.

[96] *See* MCI Telecommunications Corp. v. American Tel. & Tel. Co., *et al.*, 94 FCC 2d 332, 343-46 (1983).

[97] *United States v. California Board of Equalization*, 650 F.2d 1127, 1132 (9th Cir. 1981), *aff'd*, 456 U.S. 901 (1982), *reh'g denied*, 456 U.S. 985 (1982).

[98] *See New England Telephone and Telegraph Co. v. FCC*, 826 F.2d 1101, 1113 (D.C. Cir. 1987), *cert. denied*, 109 S. Ct. 1942 (1989) (carriers may reasonably be required "to pay full interest for earnings they had no right to retain in the first place.").

[99] *See AT&T Damages Order*, 8 FCC Rcd at 1022, para. 28.

[100] Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985) (*Phase I Order*), *on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,033 (Apr. 1, 1986) (*Phase I Reconsideration*), *on further reconsideration*, 2 FCC Rcd 190 (1987).

prescribed in CC Docket No. 84-800. We conclude that interest should be computed at the IRS rate for tax refunds.[101] In addition, we find that interest should begin to accrue from January 1, 1989, the day after which the 1987-1988 monitoring period ended. At that point, defendants were subject to the earnings limitations of a new monitoring period. Accordingly, we award interest calculated at the IRS rate for tax refunds[102] from Indiana Bell, Michigan Bell, Ohio Bell, and Wisconsin Bell to Allnet from January 1, 1989 until the date of full payment to Allnet.

IV. INCLUSION OF CERTAIN COSTS

A. Excess Deferred Taxes

1. Contentions of the Parties

41. Allnet contends that a total of $5,220,000 in excess deferred taxes allegedly included in the defendants' rate base for the 1987-1988 period must be disallowed from Indiana Bell's, Michigan Bell's, and Wisconsin Bell's expenses.[103] Allnet argues, in effect, that defendants' rates should be adjusted accordingly, and Allnet's prorated share of the excess amounts be refunded to Allnet.

42. For its part, Ameritech contends that the inclusion of these amounts in its rate base are already the subject of a separate proceeding and have been appealed to the D.C. Circuit Court.[104]

2. Discussion

43. For the most part, Allnet's contention that the excess deferred taxes must be disallowed has previously been considered and rejected by the Commission.[105] In CC Docket No. 88-1, the Commission investigated a number of issues relating to the LECs' annual 1988 access tariff filings.[106] In the *December 27 Order*, we disallowed certain projected revenue requirements associated with inside wire installation and maintenance and excess deferred taxes. The deferred tax disallowances directly affected carrier common line (CCL), traffic sensitive and special access charges. In the *April 27 Recon. Order*, we reexamined each disallowance questioned on reconsideration. In the order, we reaffirmed certain disallowances for excess deferred taxes, but we also concluded that a number of defendants were able to show that the rates during the period in question were not unjust or unreasonable notwithstanding the excess deferred taxes because their actual 1988 revenue requirements were understated by a sufficient amount to offset or compensate for the disallowances stated in Appendix C of the *April 27 Recon. Order*.[107] Specifically, with respect to the CCL component of excess deferred taxes disallowances, we found that NECA's showing that actual revenue requirements for 1988 exceeded the projected amount by $28 million, more than offsetting the total amount of potential CCL refund liability shown in Appendix C of the *April 27 Recon. Order*, rebutted the evidentiary basis of Allnet's Section 208 complaints insofar as Allnet sought to recover deferred tax disallowances through CCL rate refunds from the defendants. With regard to traffic sensitive and special access, the Commission upheld only certain disallowances for excess deferred taxes including a disallowance of $675,000 in the traffic sensitive category against Wisconsin Bell.[108] The parties, including Allnet and Wisconsin Bell, were directed to work cooperatively and engage in good faith negotiations to achieve a settlement on the damages issue consistent with the Commission's ruling.[109] We further stated that if no agreement on damages was reached, we would establish a further proceeding directed at resolving the issue of damages.[110] To date settlement has not been reached by Allnet and Wisconsin Bell,[111] and the proceeding has been appealed to the Court of Appeals for the District of Columbia Circuit. Accordingly, we decline to rule on this matter in the context of these rate of return proceedings. Allnet will have a full and fair opportunity to establish its claims based on excess deferred taxes in the context of further proceedings, as necessary, in the *Allnet v. NECA* proceeding.

B. Lobbying and MFJ-Related Litigation Expenses

1. Contentions of Parties

44. Allnet contends that certain expenses in the investments and expenses included in defendants' Forms 492 calculations should be disallowed, thereby increasing the level of earnings that defendants actually realized.[112] Allnet

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[101] We believe that the rationale adopted by the Commission for applying the IRS rate in pole attachment complaint proceedings under Section 204 of the Act, 47 U.S.C. § 204, is equally applicable here. In Teleprompter of Fairmont v. C&P of West Virginia, 79 FCC 2d 232 (1980), the Commission stated

> As a matter of fairness, we believe that the rate of interest applied in a pole attachment complaint proceeding should be readily available, easily applied, and periodically revised to reflect changes in borrowing costs. In light of these considerations, we find the interest rate for federal tax refunds and additional tax payments suitable for use in this type of proceeding. This rate appears in a variety of easily obtained official and commercial publications, and is revised on a regular basis.

79 FCC 2d at 238 [footnote omitted].

[102] The applicable IRS rates are set forth in Appendix A.

[103] Allnet Br. at 7-8.

[104] Ameritech RBr. at 7.

[105] Allnet Communication Services, Inc. v. Nat'l Exchange Carrier Ass'n, *et al.*, 6 FCC Rcd 2608, 2610 (1991) (*Allnet v. NECA), recon. denied*, 6 FCC Rcd 5663, *appeal docketed sub nom. Allnet Communication Services, Inc. v. FCC*, No. 91-1562 (D.C. Cir. Nov. 19, 1991).

[106] Annual 1988 Access Tariff Filings, CC Docket No. 88-1, Phase II, 4 FCC Rcd 4115 (1988) (*December 27 Order), recon.*, 4 FCC Rcd 3965 (1989) (*April 27 Recon. Order), further recon.*, 4 FCC Rcd 7906 (1989), *appeal dismissed sub nom. Southern Bell Tel. & Tel. Co. v. FCC*, No. 89-1081 (D.C. Cir. Nov. 12, 1991).

[107] *Allnet v. NECA*, 6 FCC Rcd at 2610.

[108] *Id.* at 2611, Appendix.

[109] *Id.* at 2611, para. 16.

[110] *Id.*

[111] Wisconsin Bell filed a petition for further reconsideration of the *Allnet v. NECA* order, which was denied. Allnet Communication Services, Inc. v. Wisconsin Bell, Inc., File No. E-89-200, 7 FCC Rcd 932 (Com. Car. Bur. 1992).

[112] Allnet Br. at 3; Complaint at para. 11. Allnet describes the expenses it claims should be disallowed as follows:

primarily relies on a report of the Wisconsin Public Service Commission (PSC) staff which Allnet states shows that the defendants improperly included $34 million in its revenue requirement for 1988, with $3.95 million directly related to lobbying activities.[113] In addition, Allnet cites a National Association of Regulatory Utility Commissions (NARUC) study of the United States Telephone Association's (USTA) 1988 expenses which found that over $2 million of USTA's revenues were being spent on honoraria and other lobbying expenses.[114] Allnet states that, as members of the USTA pool, defendants' shares of these amounts total $54,000 for 1988.[115] According to Allnet, extensive joint and comparable lobbying efforts were undertaken by each Bell Operating Company (BOC), including the defendants, during the 1987-1988 period.[116] Allnet asserts that while Southwestern Bell Telephone Company (SWB) spent $9.538 million for legislative advocacy during this period with $2.1 million allocated to interstate operations,[117] defendants claim to have spent only $40,000. Allnet contends that this amount is "clearly" an understatement particularly in view of the $3.95 million in lobbying expenses found disallowable in the Wisconsin Study.[118] Thus, Allnet argues, "it is reasonable to conclude that Defendants have failed to completely report their lobbying expenses... ."[119]

45. In addition, Allnet asserts that defendants included certain litigation expenses for the MFJ in their revenue requirement for the Form 492 calculation which should not have been included because the litigation was for purposes of entering non-regulated lines of business.[120] According to Allnet, the Wisconsin Study shows that $2.0 million in litigation expenses associated with non-basic activities were included in defendants' 1988 revenue requirement.[121] Allnet asserts that the defendants have violated the Commission's accounting rules, specifically Section 32.23,[122] by including in general legal expenses the litigation expenses for seeking to remove barriers to entry into new unregulated lines of business.[123] Allnet contends that because defendants have failed to properly assign these costs, all of defendants' litigation expenses must be disallowed for the period.[124]

46. Defendants argue that Allnet's claims are flawed because it seeks to have the Commission disallow a substantial amount of lobbying expenses based solely upon a study by the Wisconsin PSC, a NARUC study of USTA, and a conclusory argument that the amounts SWB recorded as lobbying expenses in 1988 demonstrate that Ameritech did not properly record its lobbying expenses.[125] Ameritech asserts that neither of the studies has been adopted or recognized by the Commission as being in accord with federal standards and rules for deciding whether the expenses at issue are properly treated as lobbying expenses.[126] In addition, Ameritech argues that the mere fact that SWB is a LEC doesn't mean that its lobbying activities are comparable to those of Ameritech.[127] With regard to litigation expenses, defendants state that "they have properly accounted for all their litigation expenses as required by Part 32 of the Commission's rules,"[128] and argue that Allnet has provided no evidence to the contrary.

2. Discussion

47. We have reviewed the pleadings of the parties and conclude that Allnet has failed to sustain its burden of demonstrating that Ameritech improperly recorded lobbying and litigation expenses during the period in question. Allnet's reliance on the studies conducted by the Wisconsin PSC and NARUC is unavailing. While it may be true that the Wisconsin Study reflects independent findings made by the state Commission that certain lobbying expenses may have been improperly included in Wisconsin Bell's intrastate revenue requirements for 1988, it does not necessarily follow that defendants have violated Section 201(b) of the Act or Part 32 of the Commission's rules. Nor is the NARUC Study, in which NARUC purports to show the level of honoraria and lobbying expenditures by USTA on behalf of its member companies, dispositive of Ameritech's level of compliance with the Act and the Commission's

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> [b]ased upon Allnet's information and belief, Defendants included Modified Final Judgment (MFJ) and Cable TV legislation lobbying-related costs in the expenses and investments used for computing rates of return set forth in paragraph 9 above. MFJ and CATV lobbying-related costs include the costs for all activities for the purposes of directly or indirectly influencing the outcome of legislation that would lift the MFJ line of business restrictions or transfer their oversight from the District Court that is presently overseeing the MFJ, or allow Defendant's [sic] or their affiliates into the cable television business. Examples of indirect lobbying include the publication and distribution of brochures (such as "Signals"...) which includes articles that address pending legislation, honorarium [sic] for legislators or their staffs, or the funding of events where legislators or members of their staffs are invited to attend for free or at a reduced rate.

113 Allnet Br. at 3, citing to pp. 10-13 of a State of Wisconsin, Public Service Commission report on Ameritech's accounting system date May 16, 1990 (Wisconsin Study).

114 Allnet Br. at 3-4, citing to Audit Report on the Expenditures of the United States Telephone Association, December, 1989 (NARUC Study).

115 *Id.* at 4 and 9.

116 *Id.* at 8.

117 *Id.* at 8.

118 *Id.* at 8-9.

119 *Id.* at 9.

120 *Id.* at 4. The claim was set forth in para. 12 of Allnet's Complaint

> [d]efendants included MFJ-related litigation costs in the expenses and investment used for computing the rates of return set forth in paragraph 9 above. MFJ-related litigation costs includes [sic] the costs of preparation of filings before any federal court involving the MFJ line of business restrictions, and the use of Defendants' or their owner's or affiliates' resources for such preparation activities.

121 *Id.* at 4, citing to Wisconsin Study at 11.

122 47 C.F.R. § 32.23.

123 Allnet Br. at 9-10.

124 *Id.* at 10.

125 Ameritech RBr. at 4.

126 *Id. See also* Ameritech Motion to Dismiss at 6.

127 *Id.* at 5.

128 *Id.*

rules. Ameritech explains in its Motion to Dismiss that it accounted for all lobbying and litigation expenditures "in either regulated or unregulated accounts, pursuant to the Commission's Part 32 rules."[129] In the absence of any specific showing that Ameritech failed to adhere to the Commission's rules or requirements or otherwise acted unreasonably in its treatment of lobbying expenses and certain litigation costs, we deny Allnet's complaint in this regard.

C. Affiliate Transactions

1. Contentions of the Parties

48. Allnet states that its complaint sets out how defendants were extensively engaged in transactions with their affiliates[130] and contends that defendants' handling of these transactions violated Part 32 of the Commission's rules. Allnet states that its complaint highlights that defendants purchased $259 million in services from Bellcore, who, in turn, earned a rate of return of 14.5% on sales of those services.[131] According to Allnet, a joint study of NARUC and the Commission found that such overcharges occurred.[132] Allnet contends that the $2.4 million overcharge to defendants by Bellcore should be disallowed.[133] Allnet further claims that it is entitled to its prorated share of the disallowed amounts.

49. Ameritech asserts that Allnet has not provided "one shred of proof" that Ameritech has violated the Act or the Commission's rules in its dealings with Bellcore.[134] Ameritech points out that the Commission has not adopted or endorsed the *Joint Audit Report*. Rather, Ameritech states, the Commission specifically stated in releasing certain information from the *Joint Audit Report* to state regulators that it was "not adopting the federal/state staff report or endorsing any of the analysis, conclusion and recommendations in it."[135] Ameritech contends, therefore, that the *Joint Audit Report* provides no evidence that Bellcore has overcharged Ameritech for any affiliate transactions or that any of Bellcore's charges to Ameritech violated the Act.[136]

2. Discussion

50. Section 32.27 of the Commission's rules[137] prescribes mandatory federal accounting requirements for recording transactions between a regulated carrier and its nonregulated affiliates on the carrier's regulated books of account. Section 32.27(d), which governs the recordation method for the provision of services by a nonregulated entity to a regulated affiliate, requires the carrier to record the charge for the service at the prevailing rate if the nonregulated company provides the same service to third parties. Where, however, the regulated carrier receives substantially all of a service from a nonregulated affiliate, which is not also provided to unaffiliated persons or entities, Section 32.27(d) provides that

> the service shall be recorded at cost which shall be determined in a manner that complies with the standards and procedures for the apportionment of joint and common costs between the regulated and nonregulated operations of the carrier entity.[138]

51. To obtain relief in these Section 208 complaint proceedings, Allnet has the burden of establishing, through reliable evidence, that the defendants included in their regulated rates inflated investments and expenses stemming from purchases from their affiliates and Bellcore at prices that exceeded the affiliates' fully distributed costs. Allnet relies primarily on the results and conclusions of the *Joint Audit Report* to support its claims of unlawful affiliate transaction and accounting rule violations during the 1987-1988 period. As noted above, the *Joint Audit Report* presents the views of state and federal staff members. In releasing certain information obtained during the *Joint Audit Report*, however, we specifically stated that we were not "adopting the federal/state staff report or endorsing any of the analysis, conclusion and recommendations in it."[139] Therefore, unless and until we formally adopt the staff report, it is not dispositive of the defendants' level of compliance with the Commission's affiliate transaction requirements. On the other hand, Allnet has made allegations regarding defendants' transactions with their affiliates sufficient to state a cause of action upon which, if proven, relief can be granted. We are not prepared to say, given the allegations before us, that Allnet should not be given the opportunity to prove that the defendants violated our affiliate transaction and accounting rules in the manner alleged. Consequently, we will defer ruling on this matter and direct the staff of the Bureau's Enforcement Division to establish a schedule for further proceedings as necessary to enable the parties to develop a full record upon which a decision can be made. The parties will have a full and fair opportunity to supplement the record and develop evidence and arguments relating to defendants' affiliate transactions during the period in question.

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129 Ameritech Motion to Dismiss at 5.

130 Allnet Br. at 4.

131 *Id.*

132 *Id.*, citing to Report of the Federal-State Joint Audit of Bell Communications Research, Inc. (Bellcore), NARUC (1992) (*Joint Audit Report*), which was prepared by staff members of state regulatory commissions and the Commission. Allnet asserts that the *Joint Audit Report* shows that defendants were overcharged $12 million by Bellcore for purchases between 1984 and 1990. Allnet contends that at least twenty percent, $2.4 million, of the charges occurred during the 1987-1988 time period. *Id.*

133 Allnet Br. at 10.

134 Ameritech RBr. at 3. *See also* Ameritech Motion to Dismiss at 7-9.

135 *Id.* at 4, citing Bell Communications Research, Inc., Public Release of Information Obtained during Joint Audit, 7 FCC Rcd 891, para. 1 (1992).

136 Ameritech RBr. at 4.

137 47 C.F.R. § 32.27.

138 This requirement effectively limits the nonregulated entity to the rate of return prescribed for the regulated entity. This is so because the standards and procedures for the apportionment of costs related to affiliate transactions require the regulated affiliate to record the charge from the nonregulated affiliate using a fully distributed costing methodology, which permits a return on investment calculated according to the prescribed rate of return for the regulated carrier.

139 Bell Communications Research, Inc., Public Release of Information Obtained During Joint Audit, 7 FCC Rcd 891 (1992).

V. EQUAL ACCESS

A. Contentions of the Parties

52. Allnet alleges that defendants' failure to provide intraLATA interstate presubscription or "dial-1" intraLATA[140] interstate access to other carriers, including complainant, constitutes a denial of equal access in violation of the Commission's equal access rules. Allnet further alleges that defendants' provision of dial-1 intraLATA interstate access service to themselves, while denying such access to competing carriers like Allnet, constitutes unreasonable discrimination in violation of Section 202(a) of the Act.[141] In addition, Allnet argues that the defendants assess full premium access charges on Allnet in end offices where defendants have failed to provided dial-1 interstate intraLATA access, which violates Section 69.205 of the Commission's rules.[142] Allnet asserts that defendants' customers are able to access defendants' intraLATA interstate services on a dial-1 basis while Allnet customers in defendants' serving territory must dial a 10XXX prefix, or access code, in addition to dialing the called number to access Allnet's intraLATA interstate services.[143] Allnet contends that the ability to access defendants on a dial-1 basis provides defendants with a competitive advantage over Allnet in the intraLATA interstate market.[144] According to Allnet, the Commission has not specifically reserved dial-1 access for intraLATA interstate traffic to defendants.[145] Further, Allnet states that Section 69.205 of the Commission's rules require that non-premium access charges be assessed on those carriers who are denied access equal to that provided to the Message Telephone Service/Wide Area Telephone Service (MTS/WATS) provider.[146] Thus, Allnet reasons, since its access is not equal to that of defendants as the MTS/WATS providers, Allnet should not be assessed full premium access charges by defendants. Allnet contends that it was billed $59.3 million in interstate switched and carrier common line charges during the 1987-1988 monitoring period by defendants.[147] Allnet claims that it was overcharged $33 million and, with the addition of interest of 15% over three years, Ameritech owes Allnet damages of $50.2 million.[148]

53. In response, defendants argue that they do not provide Allnet with "1+" for intraLATA interstate calls because such action is consistent with the Act, the Commission's rules and the Modification of Final Judgment (MFJ).[149] Defendants argue the equal access obligation flows from Section II.A and Appendix B of the MFJ and this obligation applies only among interexchange carriers (IXCs).[150] According to defendants, this means that Ameritech must treat all IXCs the same way as it treats AT&T, not that it must treat IXCs the way it treats itself.[151]

B. Discussion

54. Allnet's threshold claim that defendants are required to provide it intraLATA, interstate presubscription under the terms of Commission rules and decisions is unavailing.[152] Presubscription is the process by which customers are afforded an opportunity to select a specific IXC as the primary carrier to handle their interstate, interexchange traffic. Specifically, the Commission has defined presubscription as "the process by which end user customers may select... one primary interexchange carrier... to carry their "1+" interLATA long distance calls."[153] Contrary to Allnet's claims, the Commission has not, as part of the presubscription process, required the BOCs or other LECs to provide "1+" access for interstate, intraLATA MTS calls.[154]

55. Nor are we persuaded by Allnet's argument that the defendants' failure to provide intraLATA, interstate presubscription constitutes unjust and unreasonable discrimination under Section 202(a). At the outset, we find, and the parties do not contend otherwise, that the defendants' failure to provide Allnet with the same dial-1 access for intraLATA, interstate services that defendants themselves enjoy constitutes a form of discrimination in defendants' provision of "like communication service" within the meaning of Section 202(a) of the Act. [155] The question to be resolved here is whether the discrimination is justified and thus not unreasonable under Section 202(a).[156] We conclude that it is.

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[140] Local Access and Transport Area (LATA), a term created by the divestiture decree, refers to a geographically based area to which Bell Operating Companies (BOCs) telecommunications service is confined.

[141] 47 U.S.C. § 202(a).

[142] 47 C.F.R. § 69.205.

[143] Allnet Br. at 11.

[144] Allnet Complaint at para. 28.

[145] *Id.* at para. 25.

[146] *Id.* at para. 30.

[147] *Id.* at 11, citing to Attachments 1-5 of Ameritech's Interrogatory Answers.

[148] *Id.* at 10-11.

[149] Ameritech Motion to Dismiss at 9.

[150] *Id.* at 9.

[151] *Id.* at 10.

[152] Any claim regarding violations of the MFJ is appropriately raised with the District Court, not the Commission. We note that the District Court faced with a similar request from certain IXCs, denied them equal access relief. *See United States v. Western Electric Co.*, 569 F. Supp. 1057, 1108 (D.D.C. 1983).

[153] Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, 101 FCC 2d 911, 928 (1985) (*Divestiture Related Tariffs*).

[154] The Commission established an Allocation Plan under which, *inter alia*, customers would choose one IXC for their interLATA long distance calls. The Allocation Plan, by its terms, applied only to the choice of IXCs in their provision of interLATA, interstate calls and not to LECs in their provision of intraLATA, interstate calls. *Divestiture Related Tariffs*, 101 FCC 2d at 927-934 (Appendix B).

[155] Section 202(a) provides:

> It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communications service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

[156] To establish a claim that a carrier has engaged in unjust and unreasonable discrimination within the meaning of Section 202(a), a complainant must plead facts showing that the services at issue are like and that there is a difference in the carrier's provision or pricing of the services. Once like services and

56. As noted above, it is undisputed that a difference in dialing sequence exists in the defendants' provision of intraLATA, interexchange access to themselves and the access provided to Allnet and other IXCs. Although discrimination exists in the present access arrangement, it is not a form of discrimination that can be easily eliminated. Under current presubscription practices, it is not possible to presubscribe to more than one interstate carrier.[157] As a practical matter, if we were to require intraLATA, interstate presubscription, it would be highly unlikely that any customers would select the LEC for *intraLATA*, interstate calling because customers choosing the LEC would need to use IXC access codes, such as 10XXX, for all *interLATA*, interstate calls. The only other solution would be to require LECs to provide dual or multicarrier presubscription.[158] While dual or multicarrier presubscription may not be technically impossible, it would likely entail significant administrative costs and added complexity both in terms of changing presubscription procedures and in educating consumers with a different access routine. Short of requiring dual presubscription then, the discrimination complained of here can be eliminated only by requiring LECs to offer 1+ presubscription for intraLATA, interstate calling. But as noted above, such a remedy would have the practical impact of excluding the BOCs from the interstate, intraLATA market. Thus, the discrimination in dialing cannot be eliminated, only reversed in terms of the potentially aggrieved parties. Since this is not a case involving the question of LECs failing to meet their equal access obligations to interLATA, interexchange IXCs, we would have to be persuaded that other equitable factors, not presented here, were of overriding concern.

57. We do not find, therefore, Allnet's claim of unreasonable discrimination, which relies in large part on what Allnet describes as differences in the access provided to defendants, on the one hand, and IXCs on the other, to be persuasive under the circumstances described above. Nor has Allnet provided any other evidence or argument in the record before us that would persuade us to broaden, in the context of this Section 208 complaint proceeding, the Commission's presubscription procedure.[159] Based on the record in this proceeding, we do not believe that the potential competitive benefits in the relatively small intraLATA, interstate market that could result from such broadening justify the additional cost of requiring that the BOCs implement intraLATA, interstate presubscription requirements.[160] The fact that customers are able to place "1+" intraLATA, interstate calls through the BOC but must first dial an additional five digits in order to place the same call through an IXC does not, based on our review of the record before us, and under the particular circumstances presented here, constitute unjust and unlawful discrimination within the meaning of Section 202(a).

58. We are similarly not persuaded by Allnet's argument that it should be assessed non-premium charges because of the defendants' failure to provide dial-1 service. We have already concluded that defendants did not engage in unreasonable discrimination against Allnet. Nor do the Commission's rules require LECs to charge discounted rates for the type of access provided to Allnet.

59. During the transition to equal access, the Commission required discounts on line-side interstate access service because it was substantially inferior to the trunk-side access provided to the MTS/WATS provider, or AT&T.[161] Once access arrangements for a given IXC became substantially equivalent to the access provided to AT&T, the rate disparity was eliminated. Feature Group D, as provided to Allnet by defendants, has been accepted by the Commission as suitable for meeting the BOC and LEC equal access obligations.[162] Since neither Feature Group D nor the Commission's presubscription procedures comprehend 1+ calling access for intraLATA, interstate calls, the absence of this capability does not render this form of access subject to discounted rates.[163] Based on these considerations, we deny Allnet's request in this complaint proceeding that it be charged discounted rates.

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disparate treatment or pricing is shown, the burden shifts to the carrier to show that the discrimination is not unjust and unreasonable. *See MCI Telecommunications Corp. v. FCC*, 917 F.2d 30, 39 (1990).

[157] We note that to the extent a LEC provides interexchange, interstate services as in the instant case, it is considered an IXC regardless of how limited the scope of such service may be. Therefore, to the extent they provide such service, defendants could obtain eligibility to appear on a presubscription ballot in the event a general interLATA, interstate offering were required.

[158] Dual or multicarrier presubscription would mean that the caller would dial 1+ for all interstate calls, with calls routed to different carriers based on geographic location of the called number.

[159] Insofar as Allnet contends that the defendants should be required to provide dial-1 intraLATA, interstate access to it and other IXCs, we believe this issue is more appropriately addressed in the context of a rulemaking proceeding in which all affected parties would have an opportunity to participate. Our determination here is that the record developed in this Section 208 complaint proceeding does not support a finding that the defendants' failure to provide dial-1 access for intraLATA, interstate traffic constitutes unreasonable discrimination within the meaning of Section 202(a).

[160] We note that in an unrelated proceeding, Allnet has raised the issue whether the ability of a consumer to presubscribe to a preferred long distance carrier should extend to all interstate calls rather than only to interstate calls that also cross a LATA boundary as is presently the case. *See* Administration of the North American Numbering Plan, CC Docket No. 92-237, Phase II, Notice of Proposed Rulemaking, Reply Comments of Allnet Communication Services, Inc. at 1. Our determination here should not be construed as prejudging the issues and arguments presented by the parties to that proceeding.

[161] MTS and WATS Market Structure, CC Docket No. 78-72 (Phase I), 97 FCC 2d 834, 886 (1984).

[162] *See, e.g., Divestiture Related Tariffs*, 101 FCC 2d 911.

[163] We note that our rules do not provide for discounting in all cases involving provision of differing access. For example, in a case involving access arrangements within Puerto Rico for off-island calls, we determined that the need to enter additional digits to access certain carriers was not so burdensome as to warrant reduced access rates. Inquiry Into Policies to be Followed in the Authorization of Common Carrier Facilities to Provide Telecommunications Service off the Island of Puerto Rico, 8 FCC Rcd 63 (1992). The dialing disparity in that case was at least as significant as in the instant case.

VI. CONCLUSION

60. We have carefully reviewed the extensive record before us and have found, to the extent indicated herein, that complainant is entitled to an award of damages, plus accumulated interest on such damages amount, for the defendants' violations of our rate of return prescription for the 1987-1988 monitoring period. We have also concluded that the record is not sufficient to rule on the issues of affiliate transactions and direct the Bureau's Enforcement Division to establish a schedule for further proceedings as necessary to develop a full record upon which a decision can be made. We have also concluded that Allnet has not met its burden of proof in alleging that defendants have included certain lobbying and litigation expenses for the MFJ in their interstate revenue requirement. In addition, we have concluded that the complainant has failed to establish that the defendants violated the Act by failing to provide dial-1 access in the manner requested by the complainant or that Allnet is entitled to a refund of premium equal access charges.

VII. ORDERING CLAUSES

61. Accordingly, IT IS ORDERED, pursuant to Section 4(i), 4(j), 201, 206, 207, 208 and 209 of the Communications Act, as amended, 47 U.S.C. §§ 4(i), 4(j), 201, 206, 207, 208 and 209, that the above-captioned complaints filed by Allnet Communication Services, Inc. ARE GRANTED to the extent discussed herein and otherwise ARE DENIED.

62. IT IS FURTHER ORDERED that the staff of the Enforcement Division, Common Carrier Bureau SHALL ESTABLISH A SCHEDULE FOR FURTHER PROCEEDINGS consistent with Paragraphs 50-51 of this Memorandum Opinion and Order.

63. IT IS FURTHER ORDERED that Indiana Bell Telephone Company SHALL PAY to Allnet Communication Services, Inc. the sum of $124,280 (One hundred twenty-four thousand two hundred eighty dollars) within 60 days after the release of this Memorandum Opinion and Order; that Michigan Bell Telephone Company SHALL PAY to Allnet Communication Services, Inc. the sum of $409,339 (Four hundred nine thousand three hundred thirty-nine dollars) within 60 days after the release of this Memorandum Opinion and Order; that Ohio Bell Telephone Company SHALL PAY to Allnet Communication Services, Inc. the sum of $128,746 (One hundred twenty-eight thousand seven hundred forty-six dollars) within 60 days after the release of this Memorandum Opinion and Order; and that Wisconsin Bell, Inc. SHALL PAY to Allnet Communication Services, Inc. the sum of $2,385 (Two thousand three hundred eighty-five dollars) within 60 days after the release of this Memorandum Opinion and Order.

64. IT IS FURTHER ORDERED that the Indiana Bell Telephone Company, Michigan Bell Telephone Company, Ohio Bell Telephone Company, and Wisconsin Bell, Inc. SHALL PAY to Allnet Communication Services, Inc. interest on the damages awarded here at the IRS rates set forth in Appendix A from January 1, 1989 until the date full payment is made.

65. IT IS FURTHER ORDERED that the Motion to Dismiss filed by Ameritech on May 30, 1991 and that the Application for Review filed by Allnet Communication Services, Inc. on August 31, 1992 ARE DENIED.

66. IT IS FURTHER ORDERED that the Motion filed by Ameritech on May 30, 1991; that the Motion to Strike filed by Allnet Communication Services, Inc. on June 28, 1991; and that the Motion to Serve Request for Production of Documents filed by Ameritech on August 10, 1992 ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Effective Period	Rate	Internal Revenue Service Citation
01/01/87 - 03/31/87	8%	Rev.Rul. 146, 1986-2 C.B. 208
04/01/87 - 06/30/87	8%	Rev.Rul. 87-23, 1987-13 I.R.B. 46
07/01/87 - 09/30/87	8%	Rev.Rul. 87-62, 1987-29 I.R.B. 10
10/01/87 - 12/31/87	9%	Rev.Rul. 87-87, 1987-36 I.R.B. 8
01/01/88 - 03/31/88	10%	Rev.Rul. 87-131, 1987-50 I.R.B. 6
04/01/88 - 06/30/88	9%	Rev.Rul. 88-17, 1988-10 I.R.B. 6
07/01/88 - 09/30/88	9%	Rev.Rul. 88-50, 1988-25 I.R.B. 39
10/01/88 - 12/31/88	10%	Rev.Rul. 88-86, 1988-41 I.R.B. 1
01/01/89 - 03/31/89	10%	Rev.Rul. 88-105, 1988-51 I.R.B. 4
04/01/89 - 06/30/89	11%	Rev.Rul. 89-36, 1989-1 C.B. 309
07/01/89 - 09/30/89	11%	Rev.Rul. 89-69, 1989-1 C.B. 310
10/01/89 - 12/31/89	10%	Rev.Rul. 89-99, 1989-2 C.B. 256
01/01/90 - 03/31/90	10%	Rev.Rul. 89-125, 1989-2 C.B. 257
04/01/90 - 06/30/90	10%	Rev.Rul. 90-19, 1990-1 C.B. 186
07/01/90 - 09/30/90	10%	Rev.Rul. 90-47, 1990-1 C.B. 187
10/01/90 - 12/31/90	10%	Rev.Rul. 90-71, 1990-35 I.R.B. 4
01/01/91 - 03/31/91	10%	Rev.Rul. 90-94, 1990-46 I.R.B. 16
04/01/91 - 06/30/91	9%	Rev.Rul. 91-20, 1991-11 I.R.B. 1
07/01/91 - 09/30/91	9%	Rev.Rul. 91-33, 1991-21 I.R.B. 1
10/01/91 - 12/31/91	9%	Rev.Rul. 91-50, 1991-37 I.R.B. 1
01/01/92 - 03/31/92	8%	Rev.Rul. 91-65, 1991-51 I.R.B. 1
04/01/92 - 06/30/92	7%	Rev.Rul. 92-21, 1992-14 I.R.B. 14
07/01/92 - 09/30/92	7%	Rev.Rul. 92-44, 1992-24 I.R.B. 86
10/01/92 - 12/31/92	6%	Rev.Rul. 92-77, 1992-38 I.R.B. 12

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-293

In the Matter of

Amendment of Section 73.202(b), RM-8128
Table of Allotments,
FM Broadcast Stations.
(Stillwater, Oklahoma)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 22, 1993; Released: May 3, 1993

By the Chief, Allocations Branch:

1. At the request of Kenneth R. Greenwood ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 7 FCC Rcd 8548 (1992), proposing the allotment of Channel 251A to Stillwater, Oklahoma, as the community's third local commercial FM channel. Petitioner filed comments reiterating his intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by allotting Channel 251A to Stillwater since an interest has been expressed in providing the community with an additional local service. Channel 251A can be allotted to Stillwater in compliance with the Commission's minimum distance separation requirements with a site restriction of 9 kilometers (6 miles) northwest to avoid a short-spacing to Station KMOD-FM, Channel 248C, and Station KVOO-FM, Channel 253C, Tulsa, Oklahoma.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 14, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Stillwater, Oklahoma	229C2, 251A, 288A

4. The window period for filing applications will open on **June 15, 1993,** and close on **July 15, 1993**.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 251A at Stillwater are North Latitude 36-09-27 and North Latitude 97-09-20.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
the Application of

Blue Providence E Partnership — File No. 15914-CM-P-83

For Authority to Construct
and Operate a Multichannel
Multipoint Distribution Service
Station on E-group channels at
Providence, Rhode Island

MEMORANDUM OPINION AND ORDER

Adopted: April 27, 1993; Released: May 3, 1993

By the Chief, Domestic Facilities Division:

1. *Introduction.* Before the Division for consideration is a petition to amend the above-referenced application to reflect the participation of Taft Broadcasting Company (Taft) as a partner in the Blue Providence E Partnership (Blue) and a request to dismiss Taft's E-group channel MMDS application, for Providence, Rhode Island. The settling MMDS applicants, comprising Blue Providence E Partnership, were selected for qualification review in a lottery held October 29, 1985.[1]

2. *Background.* On September 24, 1985, the Commission released Lottery Notice, Report No. MMDSL-3, which listed the Multichannel Multipoint Distribution Service (MMDS) applications as accepted for filing and announced the date on which the Commission lottery would be conducted for the Providence E-group channel applications. The Lottery Notice included applications considered to be mutually-exclusive with Taft's application, including the four applications which later formed the settlement group of Blue Providence E Partnership. Blue states that Taft was made a partner in the Blue Partnership prior to the October 15, 1985 filing of its settlement documents with the Commission, but was not included in the documents filed with the Commission identifying all parties to the settlement group due to an inadvertent clerical error by the Blue Partnership. "Since the error was not discovered until the night of October 28, 1985, the settlement documents could not be amended prior to the lottery."[2]

3. *Discussion.* In 1985, the Commission found settlements to be in the public interest because they reduce or eliminate administrative burdens, delay and expenses. In addition, they allow many different parties to contribute to and to participate in MMDS service. *Second Report and Order, Amendment of the Commission's Rules and Regulations in regard to frequency allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service,* 50 Fed. Reg 5983, 5989 (Feb. 13, 1985). Commission rules require that applicants who wish to settle must notify the Commission 10 days before the date of the lottery. *Id.* at 5988. The Lottery Notice, Report No. MMDSL-3 (September 24, 1985) specifically stated that applicants intending to form a settlement group should notify the Commission as soon as possible, but *no later than 10 business days prior to the lottery.*[3] It also declared that notification of a partial settlement must include a settlement agreement signed by all parties, the names of all the applicants in the group, the percent of ownership of each group member, the preferences claimed by the combined settlement group and the application that the group has selected to represent the settlement group. Blue failed to submit information regarding the inclusion of Taft in its settlement group in a timely manner. In fact, Blue did not advise the Commission of the omission of Taft from the settlement group until November 7, 1985, nearly one month past the date required for submission of this information.

4. *Ordering Clause.* Accordingly, WE HEREBY DENY the petition filed by Providence E Partnership concerning the MMDS application of Taft Broadcasting Company. This order is issued pursuant to 47 C.F.R. Sec 0.291, and is effective on its release date. Petitions for reconsideration pursuant to 47 C.F.R. Sec. 1.106, or applications for review pursuant to 47 C.F.R. Sec. 1.115, may be filed within thirty (30) days of the date of public notice of this order. *See* 47 C.F.R. Sec 1.4(b).

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

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[1] The four MMDS applicants who joined the Blue Providence E Partnership included, Washington Post Company (File No. 15919-CM-P-83), Whitney Investment Company (File No. 16027-CM-P-83), Hubbard Broadcasting, Inc. (File No. 5729-CM-P-83), and Microband Corporation of America (File No. 8803-CM-P-83).

[2] Blue Partnership Petition at 2.

[3] We note that the Commission recently modified its policy regarding settlements. In Report and Order, PR Docket No. 93-31 (February 12, 1993) the Commission amended its rules to disallow partial and full settlement agreements among MDS applicants. Frequently, applicants participate in settlement groups to increase their chances of winning the lottery and diffuse the risk of losing their investment. Many of these applicants do not intend to construct an MDS station and instead wish to have their application granted solely for the purpose of later selling their authorization to wireless cable operators in need of spectrum. By disallowing the formation of settlement groups, we will deter such abuse of MDS lotteries, thereby reducing the number of speculative applications filed. *Id.* However, at the time the Providence lottery was held and the petition to amend was filed, the Commission encouraged settlements.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-120

In the Matter of

Amendment of Section 73.202(b), RM-8217
Table of Allotments,
FM Broadcast Stations.
(New Boston, Texas)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 15, 1993; Released: May 3, 1993

Comment Date: June 24, 1993
Reply Comment Date: July 9, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Louis M. Basso, III ("petitioner"), requesting the allotment of Channel 236A to New Boston, Texas, as the community's second local FM service. Petitioner states he will apply for Channel 236A, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 236A to New Boston, since it could provide the community with an additional FM service. Channel 236A can be allotted to New Boston in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
New Boston, Texas	278A	236A, 278A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **June 24, 1993,** and reply comments on or before **July 9, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Marjorie R. Esman, Esq.
Hardy and Carey
111 Veterans Boulevard
Suite 255
Metairie, Louisiana 70005
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202)634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 236A at New Boston are North Latitude 33-27-36 and West Longitude 94-25-18. Petitioner proposed coordinates North Latitude 33-27-29 and West Longitude 94-21-34 with a site restriction of 5.8 kilometers (3.6 miles) east. However, the Commission generally does not protect a prospective applicant's desired transmitter site for a new allotment if a less restrictive site is available, as there is no guarantee that the petitioner will ultimately become the licensee. Therefore, we will not consider petitioner's site, and advance a less restrictive site for the allotment of Channel 236A at New Boston, Texas.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-308

In the Matter of

Amendment of Section 73.202(b),	RM-6691
Table of Allotments,	RM-7008
FM Broadcast Stations.	
(Neenah-Menasha, Rhinelander	
and Rudolph, Wisconsin)	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: April 15, 1993; Released: May 3, 1993

By the Chief, Policy and Rules Division:

1. The Commission has before it for consideration the Petition For Reconsideration of the *Report and Order*, 7 FCC Rcd 4594 (1992), filed by Northwoods Broadcasting, Inc. ("Northwoods").[1] The *Report and Order* substituted Channel 261C1 for Channel 262C1 at Rhinelander, Wisconsin, and substituted Channel 262C2 for Channel 261A at Neenah-Menasha, Wisconsin, in response to a petition filed by Evangel Ministries, Inc. ("Evangel"). We also denied the counterproposal filed by Point-Rapids Broadcasting proposing the substitution of Channel 260C3 for Channel 260A at Rudolph, Wisconsin.

2. Northwoods, the licensee of Station WRHN(FM), Channel 261C1, Rhinelander, requests clarification of the *Report and Order* which ordered the channel substitutions.[2] While Evangel states its willingness to reimburse Northwoods for reasonable expenses in changing frequencies, Northwoods notes that there is no ordering or conditioning clause in the *Report and Order* specifically requiring reimbursement. Northwoods requests that this requirement be made explicit. Northwoods also asks that the Commission's policy regarding the costs of a channel change be "clarified." Northwoods argues that it has been operating on the channel for a number of years and it should be compensated for abandoning its established dial position. It also requests that we require payment for these costs prior to the time that Northwoods actually incurs these costs.

3. Evangel, licensee of station WEMI, Neenah-Menasha, Wisconsin, objects to the Petition for Reconsideration. Evangel notes that it expressly stated its willingness to reimburse Northwoods, for the reasonable costs incurred in changing channels. In response to Northwoods' request for an express order requiring reimbursement, Evangel notes that the Commission does not impose such an order or condition in similar circumstances.[3] Furthermore, Evangel has represented its willingness to comply with the Commission's reimbursement policy and the Commission has relied on that representation in upgrading WEMI's channel. Evangel submits in response to Northwood's insistence on advance payment that such a procedure is both unnecessary and counterproductive as Evangel and Northwoods have already commenced negotiations concerning the items subject to reimbursement and the appropriate cost of such items. Evangel contends that in the event no agreement is reached in this matter, Northwoods has adequate recourse, as the Commission has established itself as the arbiter of any disputes over the scope of reimbursement. Finally, Evangel requests the Commission take prompt action on this matter so as not to delay further Evangel's inauguration of enhanced service to the public.

4. We shall deny the Petition for Reconsideration. We realize that changing the channel of an existing station may create disruption to a station's audience and creates new expenses for the licensee. However, the *Report and Order* and the *Notice of Proposed Rule Making*, 4 FCC Rcd 5422 (1989), stated that the Rhinelander station is entitled to reimbursement and reiterated Evangel's commitment to provide such reimbursement. Commission policy regarding reimbursement was established in *Circleville, Ohio*, 8 FCC 2d 159 (1967). Our experience indicates that parties generally enter into good faith negotiations and resolve the amount of reimbursement well before a station actually changes channels. Furthermore, there is nothing in the record in this proceeding, and Northwoods offers no evidence, to suggest that Evangel will not be able to reimburse Northwoods for its expenses. In the present situation, we do not believe it is necessary to impose a condition on Evangel requiring reimbursement prior to the Rhinelander channel substitution. Routinely imposing such a condition on rule making authorizations, either for new allotments or upgrades, could be unnecessary and burdensome to the parties and the Commission, and could delay the initiation of expanded service. *See Churchville and Luray, Virginia*, 5 FCC Rcd 1106 (1990), *recon. denied*, 6 FCC Rcd 1313 (1991); *New Sharon and Albia, Iowa and Memphis, Missouri*, 6 FCC Rcd 7429 (1991); *Castle Rock, Colorado Springs, Frisco and Salida, Colorado and Raton, New Mexico*, 7 FCC Rcd 7668 (1992).

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[1] Public notice was given on October 6, 1992 (Report No. 1911).

[2] Northwoods points out that the Commission overlooked the fact that Station WRHN(FM) is no longer operating pursuant to its license (BLH-901012KB), but is instead operating pursuant to a construction permit (BPH-890131IB). It notes that paragraph 13 of the *Report and Order*, the ordering clause referring to the Rhinelander channel substitution, referenced File No. BLH-901012KB. The ordering clause is in error. Station WRHN was upgraded from Channel 262C2 to Channel 262C1 in MM Docket 87-280. *See* 3 FCC Rcd 2432 (1988). Northwoods has a construction permit for Channel 262C1 (File No. BPH-890131IB) and has filed an application for a license to cover the construction permit (BLH-920629KS). Therefore, the *Report and Order* should have referenced BPH-890131IB.

[3] Evangel cites to *Boone and Emmetsburg, Iowa*, 7 FCC Rcd 6828 (1992), as an example of a Commission staff action requiring reimbursement.

5. Accordingly, IT IS ORDERED, That the Petition for Reconsideration filed by Northwoods Broadcasting, Inc. IS DENIED.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section
1.80(d) of the
Commission's Rules

ORDER

Adopted: April 13, 1993; **Released: May 3, 1993**

By the Commission:

1. Congress recently amended section 503(b)(5) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b)(5), to provide that nonlicensee tower owners may be subject to forfeiture for violations of the painting and/or illumination requirements for radio towers as prescribed by the Commission without a prior citation under certain conditions. Pub. L. No. 102-538, 106 Stat. 3533, enacted October 27, 1992. By this *Order* we amend section 1.80(d) of our rules, 47 C.F.R. § 1.80(d), to reflect the amended statute.

2. Specifically, the amendment to section 503(b)(5) allows the Commission to assess forfeitures for violations of Section 303(q) if the nonlicensee tower owner has previously received notice of the obligations imposed by Section 303(q) from the Commission or the permittee or licensee who uses the tower.

3. The change to section 1.80(d) of our rules adopted herein merely restates in our rules the statutory language of 47 U.S.C. § 503(b)(5). Therefore, the Commission for good cause finds that compliance with the notice and comment and effective date provisions of the Administrative Procedure Act is unnecessary. *See* 5 U.S.C. §§ 553(b)(B), 553(d)(3).

4. Accordingly, pursuant to sections 4(i), 303(r) and 503(b)(5) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), 503(b)(5), IT IS ORDERED that 47 C.F.R. § 1.80(d) is AMENDED as set forth in the Appendix, EFFECTIVE upon publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Title 47 of the Code of Federal Regulations, Part 1, is amended as follows:

Part 1 - Practice and Procedure.

1. The authority citation for Part 1 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303; Implement, 5 U.S.C. 552 and 21 U.S.C. 853a, unless otherwise noted.

2. Section 1.80 is amended by revising the second sentence of paragraph (d) to read as follows.

Miscellaneous Proceedings

§ 1.80 Forfeiture proceedings

* * * * *

(d) **Preliminary procedure in some cases; citations.** * * * However, a forfeiture penalty may be imposed, if such person is engaged in (and the violation relates to) activities for which a license, permit, certificate, or other authorization is required, or if such person is a cable television operator, or in the case of violations of section 303(q), if the person involved is a nonlicensee tower owner who has previously received notice of the obligations imposed by section 303(q) from the Commission or the permittee or licensee who uses that tower.

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PACIFIC GATEWAY EXCHANGE, INC. File No. I-T-C-93-038

Application for Authority Under Section 214 of the Communications Act of 1934, as amended, to acquire and operate facilities for the provision of common carrier services between the United States and Australia, Hong Kong, Korea, New Zealand, Singapore and Taiwan.

ORDER AND AUTHORIZATION

Adopted: March 25, 1993; Released: May 3, 1993

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned application filed pursuant to Section 214 of the Communications Act of 1934, as amended, by Pacific Gateway Exchange, Inc.[1] (PGE), we find that the public convenience and necessity would be served by PGE's provision of private line and switched voice services between the United States, on the one hand, and Australia, Hong Kong, Korea, New Zealand, Singapore and Taiwan, on the other hand, via INTELSAT facilities.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-93-038 IS GRANTED, and PGE is authorized to:

a. lease from Comsat and operate 64 64-Kbps satellite half-circuits (either IDR or SCPC FM), allocated in accordance with Appendix A, between an appropriately-licensed U.S. earth station in the Continental United States and an appropriate INTELSAT satellite over the Pacific Ocean, connecting with similar circuits between the satellite and an earth station in each of the points listed in Appendix A furnished by PGE's correspondent in that point;

b. lease and operate 64 64-Kbps circuits, allocated in accordance with Appendix A, in an appropriately-licensed U.S. earth station in the Continental United States;

c. lease and operate appropriate connecting facilities between the earth station in (b.) and PGE's operating center in Los Angeles, California; and

d. use said facilities to provide international private line and switched voice services between the United States and those points listed in Appendix A.

3. IT IS FURTHER ORDERED that our authorization of PGE to provide private lines is limited to the provision of such private lines only between the United States and those points listed in Appendix A -- that is, private lines which originate in the United States and terminate in one of the points listed in Appendix A, or which originate in one of the points listed in Appendix A and terminate in the United States. In addition, PGE may not -- and PGE's tariff must state that PGE's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international switched services, unless authorized to do so by the Commission upon a finding that the foreign administration affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), *Order on Reconsideration and Third Further Notice of Proposed Rulemaking*, 7 FCC Rcd 7927 (1992).

4. IT IS FURTHER ORDERED that neither PGE nor any persons or companies directly or indirectly controlling or controlled by PGE, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which PGE or any persons or companies controlling or controlled by PGE are parties.

5. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between PGE and its correspondent in each of the countries listed in Appendix A, and PGE shall file copies of the agreement, including the applicable accounting rate, with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. § 43.51.

6. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

7. IT IS FURTHER ORDERED that PGE shall file a tariff pursuant to Section 203 of the Communications Act, 47 C.F.R. § 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

8. IT IS FURTHER ORDERED that PGE shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. § 43.61.

9. IT IS FURTHER ORDERED that PGE shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. § 63.10(b), for INTELSAT satellite circuits.

10. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applica-

[1] We placed the application on public notice December 2, 1992. No comments were filed.

tions for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

APPENDIX A

Country	Initial Circuits	
	Satellite (64-kbps)	Earth Station (64-kbps)
Australia	12	12
Hong Kong	12	12
Korea	12	12
New Zealand	8	8
Singapore	8	8
Taiwan	12	12

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-584

In re Applications of

EDWIN A. BERNSTEIN	File No. BPH-870330NC
RADIO CENTER MORICHES LIMITED PARTNERSHIP	File No. BPH-870331MV
DAKK, INC.	File No. BPH-870331ND
FRIENDSHIP COMMUNICATIONS, LTD.	File No. BPH-870415KS
HAMPTON COMMUNICATIONS LIMITED PARTNERSHIP	File No. BPH-870415KY

For Construction Permit for
a New FM Station on Channel 241A
at Center Moriches, New York

ORDER

Adopted: April 23, 1993; Released: May 5, 1993

By the Review Board: MARINO (Chairman), BLUMENTHAL, and GREENE.

1. In a *Memorandum Opinion and Order*, 6 FCC Rcd 6841 (Rev. Bd. 1991), the Review Board remanded the above-captioned proceeding on certain qualifying issues against DAKK, Inc. Subsequently, by a separate *Notice of Apparent Liability for Forfeiture*, 7 FCC Rcd 37 (Rev. Bd. 1992), DAKK was notified, as the Board is mandated to do under 47 CFR § 1.80(f)(1), that it may be liable for a forfeiture upon an adverse finding of the specified issues. *Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, 6 FCC Rcd 157, 164 (1990).

2. However, upon remand, presiding Administrative Law Judge Edward Luton (ALJ) dismissed the application of DAKK, Inc. prior to an evidentiary hearing on the issues, thus precluding any determination on the question of forfeiture. *Order*, FCC 92M-1074, released December 8, 1992. The Board has denied DAKK's appeal from that dismissal. *Edwin A. Bernstein*, FCC 93R-15, adopted April 22, 1993. Consequently, this matter is referred directly to the Commission for appropriate action.

3. ACCORDINGLY, IT IS ORDERED, That the Administrative Law Judge's dismissal *Order*, FCC 92M-1074, released December 8, 1992, and the Review Board's *Memorandum Opinion and Order*, FCC 93R-15, adopted April 22, 1993, ARE FORWARDED to the Commission consistent with paragraph 2, above.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-584

In re Applications of

EDWIN A. BERNSTEIN	File No. BPH-870330NC
RADIO CENTER MORICHES LIMITED PARTNERSHIP	File No. BPH-870331MV
DAKK, INC.	File No. BPH-870331ND
FRIENDSHIP COMMUNICATIONS, LTD.	File No. BPH-870415KS
HAMPTON COMMUNICATIONS LIMITED PARTNERSHIP	File No. BPH-870415KY

For Construction Permit for
a New FM Station on Channel 241A
at Center Moriches, New York

MEMORANDUM OPINION AND ORDER

Adopted: April 22, 1993; Released: May 5, 1993

By the Review Board: MARINO (Chairman), BLUMENTHAL, and GREENE.

1. The Board has before it the Appeal of DAKK, Inc. (Appellant) filed December 31, 1992 and oppositions to that appeal filed by Friendship Communications, Ltd. and Edwin A. Bernstein.[1] Appellant challenges its dismissal, memorialized by the *Order*, FCC 92M-1074, released December 8, 1992, by Administrative Law Judge Edward Luton (ALJ), wherein the ALJ dismissed appellant's application for the reasons more fully set out orally by the ALJ at Tr. 1635-1651.

BACKGROUND

2. In reviewing the *Initial Decision*, 5 FCC Rcd 6629 (ALJ 1990), and responding to the exceptions thereto, the Board then requested that appellant supplement the hearing record on its financial proposal which purportedly relied upon on a proposed loan from Midlantic North Bank.[2] Although appellant's financial proposal had been the subject of much attention at the original hearing and later at oral argument before the Board, appellant never once disclosed at hearing, in its pleadings or argument to the ALJ or the Board that -- nearly two years earlier -- it had been expressly informed by letter of September 12, 1989 from Midlantic North that, whatever appellant's prior apprehension, that bank was no longer interested in financing appellant, and would not do so. *See Edwin A. Bernstein*, 6 FCC RCd 6841, 6842 (Rev. Bd. 1991)(*Remand Order*).[3] In fact, as our *Remand Order* recounts, it was not until the bitter end of an exchange of pleadings in July 1991 (*see supra* notes 2-3) that appellant *first* revealed that the purported Midlantic Bank North financing had been negated by that bank nearly two years before. Instead, appellant (also for the *first* time) informed the Commission (and the parties) that it intended to rely on a different source for financing, CVC Capital Management Corp. *See Remand Order*, 6 FCC Rcd at 6842.

3. For the reasons more fully explicated in that *Remand Order*, the Board found itself with no practical option but to send the matter back to the ALJ for the adduction of evidence:

> (1) To determine whether DAKK has violated Section 1.65 of the Commission Rules, and whether any such violation reflected a deliberate attempt to conceal;
>
> (2) To determine whether DAKK lacked candor in its prosecution of this case in pleadings filed in this proceeding.
>
> (3) To determine, in light of the foregoing, whether DAKK is qualified to be a Commission licensee.

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[1] On December 31, 1992, Bernstein filed a pleading styled "Notice of Appeal." This latter pleading is wholly unrelated to DAKK's instant appeal of its dismissal, but is filed (according to Bernstein counsel) "to preserve and refresh" its previously filed exceptions. This pleading is neither an appeal nor is it authorized under any other provision of the Commission's Rules. Friendship filed an opposition to Bernstein's "appeal." We strike Bernstein's frivolous pleading, *sua sponte*, and remind counsel of the duties specified in 47 CFR § 1.52.

[2] *Memorandum Opinion and Order*, 6 FCC Rcd 2875 (Rev. Bd. 1991).

[3] Indeed, appellant's immediate response to the above-noted Board *MO&O* was to seek a two week extension of time in which to supply supplementary materials from Midlantic North Bank. *See Bernstein, supra*, 6 FCC Rcd at 6841. Again, however, nowhere in its extension request did appellant intimate that it was not relying on Midlantic for financing, nor had it been so relying since September 1989. Instead, appellant finally submitted a plainly innocuous letter of June 21, 1991 from the bank, *see id.*, but *again* did not suggest in the slightest that the bank had absolutely negated any interest in a loan nearly two years before. That critical fact did not come to light until a much later clash of pleadings in July 1991. *See id*, at 6841-42.

Id., 6 FCC Rcd at 6843.[4] Upon return of this case, appellant argued to the ALJ (1) that notwithstanding the discussion in our *Remand Order* and the Board's addition of the immediately aforecited three critical issues, appellant had no obligation to "amend" its financial proposal, because (2) the *Remand Order* was intended to focus not on those three specific issues, but *only* on a contingent issue that sought to explore, if necessary and appropriate, subsidiary questions pertaining to its new claim of reasonable assurance of financing from CVC Capital Management Corp. *See supra* note 4.

APPEAL

4. In its instant pleading, appellant repeats the arguments made to the ALJ. It maintains that the ALJ misconstrued the Board's *Remand Order* because "the Board ordered a hearing on the CVC financing, plain and simple." Appeal at 2. It further submits that, in remanding this case, the Board purposely intended that precedent such as *Aspen FM, Inc.*, 6 FCC Rcd 1602 (1991) and the Board's determination in *Radio Representatives, Inc.*, 6 FCC Rcd 6995 (Rev. Bd. 1991)[5] were to be regarded as "inapposite" in its particular case. Appeal at 3. It claims, therefore, that "[f]undamental due process requires that the Presiding Officer's [dismissal] ruling be reversed." *Id.*, at 4.

DISCUSSION

5. The appeal before us is patently without merit. It is beyond argument that the primary purpose of our *Remand Order* was to delve into the reasons why appellant had not informed the ALJ, the parties, or this Board that it had lost its (purported) bank financing in September 1989, *see id.*, 6 FCC Rcd at 6842 (citing, *inter alia, Texas Communications Limited Partnership*, 6 FCC Rcd 5191, 5192 (1991)). And, as we just repeated in a recent case:

> The law we must follow is bright: "in the absence of a demonstration by the applicant that it had reasonable assurance *at the time of certification*, subsequent petitions to amend financial proposals have been disallowed." *Aspen FM, Inc.*, 6 FCC Rcd 1602, 1603 (1991) (emphasis added); *see also Capital City Broadcast Co.*, 7 FCC Rcd 2629 (1992)(no liberal amendment policy where initial financial certification is fatally flawed); *KIST Corp.*, 99 FCC 2d 173, 175-181 (Rev. Bd. 1984), *modified on other grounds*, 102 FCC 288 (1985), *aff'd per judgement sub nom. United American Telecasters, Inc. v. FCC*, 801 F.2d 1436 (D.C. Cir. 1986), *cert. denied*, 481 U.S. 1050 (1987).

Fox Television Stations, Inc., FCC 93R-9, released March 10, 1993, at para. 99.[6] Nowhere in the Board's *Remand Order* did it, nor could it, intimate that established case precedent be ignored.

CONCLUSION

6. Twice before in this proceeding, the Board has afforded appellant an open opportunity to eliminate questions about its Midlantic North financing and all relevant circumstances pertaining thereto. *See Memorandum Opinion and Order, supra* note 2 (seeking record supplementation); *Remand Order* (seeking explanation of appellant's failure to report loss of purported bank loan). Regrettably, appellant has failed on each occasion to uphold its corresponding duties. In our view, appellant has temporized long enough, *see generally Chudy Broadcasting Corp.*, 58 RR 2d 133 (1986); *cf Hillebrand Broadcasting, Inc.*, 1 FCC Rcd 419 (1986), and we must hold that the ALJ did not abuse his discretion in rejecting appellant's vacuous arguments and dismissing its application.

7. ACCORDINGLY, IT IS ORDERED, That the appeal filed December 31, 1992 by DAKK, Inc. IS DENIED; and that the Notice of Appeal filed on December 31, 1992 by Edwin A. Bernstein IS DISMISSED.[7]

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

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[4] On the prospect that appellant might acquit itself fully on the first three issues designated, and was therefore found not to be basically unqualified, our *Remand Order* went on to say (6 FCC Rcd at 6843; emphasis added):

> Finally, so long as there must be held a supplemental evidentiary hearing, we will *also* ask the ALJ to take evidence on, and resolve, the question of whether DAKK has reasonable assurance of a firm commitment of a loan from CVC Capital Management. Just as with its original letter from Midlantic North, a key question remains as to whether DAKK has demonstrated adequate collateral to its financial source. *See Chapman Radio & Television Co.*, 70 FCC 2d 2063, 2072 (1979). An issue shall be tried:
>
> (4) To determine whether DAKK has reasonable assurance of a loan from CVC Capital Management, and whether it is basically financially qualified to be a licensee.

[5] In *Radio Associates*, the Board made plain that an applicant must make a "good cause" showing, pursuant to 47 CFR § 73.3522(b), before it can rely on a belated financial proposal. *See generally also Prater & Durham, et al. v. FCC*, No. 91-1409 (D.C. Cir. Dec. 28, 1992) (aff'g by memorandum dismissal of two applicants for lack of timely showing of financing).

[6] *Petition for Reconsideration* pending.

[7] As a matter of comity to the Commission, as well as a matter of prudence inasmuch as the Commission does not invariably sustain applicant dismissals, *see, e.g., Nancy Naleszkiewicz*, 7 FCC Rcd 1797 (1992), the Board will defer action on the exceptions of the other parties until the Commission acts with finality on any application for review, especially since appellant was declared the comparatively superior applicant in the *Initial Decision*.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

PETER WAYNE LECHMAN File No. BLH-910327KE

For License to Cover Construction
Permit for Station WBOP(FM),
Churchville, Virginia

MEMORANDUM OPINION AND ORDER

Adopted: April 27, 1993; Released: May 4, 1993

By the Chief, Audio Services Division:

1. The Commission has before it: (i) the above-captioned application of Peter Wayne Lechman ("Lechman") for license to cover construction permit modifying the facilities of station WBOP(FM), Churchville, Virginia; (ii) an informal objection to that application, filed on November 21, 1991 on behalf of Commonwealth Audio Visual Enterprises, Inc. ("CAVE"), licensee of station WLCC(FM), Luray, Virginia; and (iii) a pleading styled "Opposition to Informal Objection and Request for Evidentiary Hearing on Cost Reimbursement," filed on December 18, 1991, by Lechman. The purpose of this order is to resolve the dispute between the parties regarding the amount owed by Lechman to CAVE as reimbursement for the reasonable and prudent costs of WLCC's recent frequency change, which was necessary in order to accommodate WBOP's upgrade.

2. Preliminarily, we note that with regard to reimbursement for the cost of changing frequency, the Commission expects the parties involved to determine expeditiously, mutually and in good faith what are reasonably and prudently incurred reimbursable expenditures. The Commission will involve itself in such matters *only* as a last resort. *See, e.g., Harold A. Jahnke,* 74 FCC 2d 265 (1979). Moreover, in the event that the parties cannot agree to a solution in such matters, we encourage the parties to consider the following approach. In 1990, Congress amended the Administrative Procedures Act through enactment of the Administrative Dispute Resolution Act, P.L. 101-552, (November 15, 1990), and Negotiated Rulemaking Act, P.L. 101-648 (November 29, 1992). In 1991, the FCC adopted an *Initial Policy Statement and Order* in which it expressed confidence that Alternative Dispute Resolution Procedures could provide "an effective tool for dealing with conflict, while avoiding the expense and delay of adversarial proceedings." 6 FCC Rcd 5669, 5670 (1991). Therefore, reimbursement matters are appropriate for submission to the Alternative Dispute Resolution Program for resolution. Regrettably, in the instant case, the parties have failed in over two years to reach agreement or submit to binding arbitration. Accordingly, under our current policies, this dispute will be adjudicated by the Commission.

3. *Background.* In 1989, Lechman, then holder of a construction permit for a new FM station in Churchville, filed a petition for rulemaking to upgrade the Churchville allotment from Channel 294A to Channel 292B1. Noting that such a proposal would work only if the license of WLCC was modified to specify operation on Channel 289A rather than its operative Channel 292A, Lechman stated his willingness to reimburse CAVE. *Notice of Proposed Rulemaking and Order to Show Cause,* 4 FCC Rcd 3903 (M. M. Bur. 1989). Lechman's proposal was granted over CAVE's objections. *Report and Order* in MM Docket 89-95, 5 FCC Rcd 1106 (M.M. Bur. 1990). The Chief, Allocations Branch, noted that:

> Petitioner ... reiterates his willingness to reimburse Station WLCC(FM) for its legitimate and prudent out-of-pocket expenses incurred in the proposed change of frequencies. Petitioner states that "as a show of good faith" he is willing to establish an escrow account in the amount of $10,000 to fund the initial costs associated with the frequency change at Luray within five days after the Commission's action granting the proposal. Petitioner states that he is willing to completely reimburse Station WLCC(FM) for any additional legitimate and prudent costs incurred in connection with the channel change beyond the funds established in the escrow account consistent with *Circleville, Ohio,* 8 FCC 2d 159 (1967).

Id. CAVE filed a petition for reconsideration of that action, stating, *inter alia,* that the Allocations Branch erred in not prohibiting Station WBOP from commencing program tests without the issue of the amount of reimbursement being resolved and payment being made to CAVE. The petition was denied by the Chief, Policy and Rules Division, on February 28, 1991. *Memorandum Opinion and Order* in MM Docket No. 89-95, 6 FCC Rcd 1313 (M.M. Bur. 1991). He held that:

> Our experience indicates that parties generally enter into good faith negotiations and resolve the amount of reimbursement well before a station actually changes channels. There is nothing in the record in this proceeding to suggest that Lechman would not proceed in good faith to meet his reimbursement requirement or otherwise indicate a need to impose such a condition.

Id. at 1314.

4. In the meantime, notwithstanding CAVE's appeal of the rulemaking proceeding, Lechman filed an application (BMPH-900712IC) to implement the upgrade. His application was granted on November 8, 1990. According to CAVE, the parties entered into an agreement after the release of the *Memorandum Opinion and Order* in MM Docket No. 89-95 whereby CAVE agreed to forego any further litigation with respect to Lechman's upgrade, and Lechman agreed to reimburse CAVE for the reasonable and prudent expenses incurred in changing frequencies. Accordingly, in March of 1991, WLCC filed an application to change frequency pursuant to MM Docket No. 89-95,

which was granted September 24, 1992. Also in March of 1991, Lechman completed construction of WBOP and filed the captioned license application.[1]

5. *Pleadings.* In its informal objection to the captioned license to cover permit no. BPH-900712IC, CAVE alleges that it has incurred expenses of $29,557.18 in making the frequency switch, and that it has received no reimbursement whatever from Lechman, who never established the $10,000 escrow account. CAVE itemizes its expenses in Exhibits D and E of its objection. In opposition, Lechman states that he "recognizes his responsibility to reimburse CAVE for the legitimate and prudent expenses necessary for the WLCC channel change," but takes issue with the amount claimed. Finally, Lechman requests an evidentiary hearing on the amount of reimbursable expenses due CAVE, because CAVE allegedly would not accept Lechman's reimbursement offer.

6. To date, the parties have made the following representations to the Commission. Lechman has represented that he would establish a $10,000 escrow account to cover initial reimbursable expenses, adding that he would "completely reimburse" any additional reasonable and prudent expenses incurred by CAVE. It is uncontroverted that he has not done so. CAVE, on the other hand, has represented that it incurred expenses amounting to $29,557.18, broken down as follows:

1. Printing (company checks, advertising certificates, rate brochures, operation logs/time orders) . . . $1,166.52
2. Promotional Items (signs, bumper stickers, T-shirts, jackets, stadium cups, etc.) $3,029.55
3. On-air jingle package for station ID $10,800.00
4. Engineering, Legal & Equipment $10,263.91
5. Advertising (television/newspaper) $2,197.20
6. Off-air expenses (8 hours silence to perform frequency move $200/hour $1,600.00
7. Miscellaneous (undocumented) expenses $500.00

7. In a letter from Lechman to CAVE dated October 10, 1991, submitted as Exhibit F to CAVE's informal objection, Lechman submitted the following calculation of CAVE's expenses:

1. Reprint of signs $50.00
2. Kinko's Printing (logs, etc.) $78.00
3. Freight Charge $98.98
4. Harris Corporation $1170.00
5. Mountain Valley (Engineering)
   Invoice 3/11/91 . . . . . $299.25
   Invoice 4/11/91 . . . . . $147.60
   Invoice 2/28/91 . . . . . $266.50
   Invoice 3/15/91 . . . . . $136.64
6. Fawcette Telephone Bill $37.70

Thereafter, in his opposition to CAVE's informal objection, Lechman represented to the Commission that, "based on receipts that have been given to him," CAVE's reimbursable expenses total $2832.77.[2] Lechman also disputes CAVE's claim of reimbursement for the "jingle package" which, he states, was not necessitated by the frequency change and was in fact never purchased by CAVE. Finally, Lechman concludes by representing to the Commission that he has agreed to pay to CAVE $5,000 to resolve the matter. Opposition, at 4-5.

8. *Discussion.* At the outset, we note that, as the Court of Appeals for the District of Columbia Circuit has recognized, Congress clearly intended to invest in the FCC a large discretion to avoid time-consuming hearings when possible. *Citizens for Jazz on WRVR, Inc. v. FCC,* 775 F. 2d 392, 395 (D.C. Cir. 1985), *citing Southwestern Operating Co. v. FCC,* 351 F. 2d 834, 835 (D.C. Cir. 1965). Additionally, the court has held that "[c]ontradictory allegations and affidavits which create some possibly unresolved factual issue do not invariably necessitate an evidentiary hearing before the Commission ...." *Broadcast Enterprises, Inc. v. FCC,* 390 F. 2d 483, 485 (D.C. Cir. 1968). However, we further note that, should it subsequently be determined that substantial and material questions of fact exist regarding whether or not either party here has intentionally misrepresented facts to or lacked candor with the Commission, we reserve the right to recommend to the Commission *en banc* that an evidentiary hearing be held, either pursuant to under 47 U.S.C. § 312(a) or § 319, as appropriate.

9. The Commission's guidelines for determining the reimbursement owed by the benefiting party to a licensee ordered to change its assigned channel were set forth in the *Second Report and Order* in BC Docket No. 16662 (Circleville, Ohio), 8 FCC 2d 159 (1967) (*"Circleville"*). The Commission held there that reimbursement is proper for: (i) engineering, legal and equipment charges; (ii) printing (logs and stationery); (iii) out of pocket nonreducible expenses while the station is off the air; (iv) advertising promotion for the new frequency; and (e) miscellaneous expenses.

10. We believe that, under *Circleville,* and in the absence of any contrary showing by Lechman, the majority of CAVE's expenses are reasonable and therefore reimbursable. Its legal, engineering, and equipment expenses are thoroughly documented with invoices and statements from the professionals involved, as are the printing and promotional/advertising expenses. We will allow these claims in their entirety. Similarly, we believe that the $500 claim for miscellaneous expenses, as with the $100 amount claimed in *Circleville,* "appears appropriate." 8 FCC Rcd at 164.

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[1] CAVE subsequently brought a civil action for damages against Lechman in the Circuit Court of Page County, Virginia, At Law No. 6684, alleging that: (i) Lechman owes CAVE all reasonable and prudent expenses incurred in its channel change; (ii) Lechman breached its contract with CAVE; and (iii) Lechman fraudulently induced CAVE to agree to forego additional litigation and change its frequency. By letter dated March 18, 1993, the Commission's General Counsel opined that the second and third matters were properly within the jurisdiction of the Virginia court, while the first matter was for the Commission to decide and should be referred to the agency if not dismissed. *Letter to Mark J. Prak, Esq.,* dated March 18, 1993.

[2] This figure matches the total contained in Lechman's October 10, 1991 letter to CAVE.

11. CAVE's two additional claims, for the "jingle package" and off-air expenses, are more problematic. While *Circleville* recognizes that "most of the informational job [of announcing the frequency change] could be done by announcements over the station ... we do not believe the benefiting party should be required to pay for improving the situation of the existing station." *Id.* CAVE has not demonstrated that re-cutting the station's three jingle packages was a reasonable and prudent expense connected with the frequency switch: for example, we do not know the contents of the announcements or why they must now be changed.[3] We also note that CAVE has not addressed Lechman's assertion that the jingles have not been purchased. Finally, while in *Circleville* the Commission allowed out of pocket nonreducible expenses incurred while the station is off the air, the expenses approved in *Circleville* were based on a rate of $983.00 nonreducible expenses *per week*. Here, CAVE claims expenses at a rate of $200.00 *per hour*, but fails to support or document that assertion in any way. Therefore, we believe it inappropriate to allow those expenses at this time. Accordingly, we will order Lechman to pay to CAVE the sum of $17,157.18.

12. Accordingly, IT IS ORDERED, That Peter Wayne Lechman SHALL REMIT to Commonwealth Audio Visual Enterprises, Inc. the sum of $17,157.18 as follows: Lechman shall immediately pay to CAVE the $10,000 which he represented would be placed into escrow for this purpose, and shall remit the balance of $7,157.18 within 30 days of the release of this Order. Certification of payment should be filed with the Office of the Secretary of the Commission within three days of the tender of payment. IT IS FURTHER ORDERED, That the informal objection to the grant of license application no. BLH-910327KE, filed on November 21, 1991 by CAVE, IS GRANTED TO THE EXTENT INDICATED HEREIN AND IS DENIED IN ALL OTHER RESPECTS. IT IS FURTHER ORDERED, That the "Opposition to Informal Objection and Request for Evidentiary Hearing on Cost Reimbursement" filed on December 18, 1991 by Lechman IS DENIED. Finally, IT IS ORDERED, That the captioned license application IS HELD IN ABEYANCE pending notification by Lechman that the amount herein found to be due and owing to CAVE has been paid.

FEDERAL COMMUNICATIONS COMMISSION

Larry D. Eads, Chief
Audio Services Division
Mass Media Bureau

[3] We will not state here that such expenses are never reimbursable. However, the expense must be reasonable and the claimant must demonstrate some clear nexus between the frequency switch and the expense.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Request for waiver of the requirements in Section 80.453 of the Rules to permit public coast station WHU638 to serve mobile vehicles on land.

MEMORANDUM OPINION AND ORDER

Adopted: April 28, 1993; Released: May 4, 1993

By the Chief, Special Services Division:

I. INTRODUCTION

1. Coastal Marine Telephone (Coastal), licensee of very high frequency (VHF) public coast station WHU638, has requested a waiver of Section 80.453 of the Rules, 47 C.F.R. § 80.453, and modification of its station license to permit it to serve a limited number of land mobile vehicles on a secondary basis. This action grants the requested waiver.

II. BACKGROUND

2. In the *Report and Order* in PR Docket No. 86-2, 1 FCC Rcd 1312 (1986) (*Report and Order*), the Commission declined to adopt rules that would have permitted VHF public coast stations to serve vehicles on land on a subsidiary basis. The Commission found that conditions in the VHF public coast station market are not sufficiently homogeneous to permit such service nationwide. The Commission stated: "The comments point out that maritime frequencies in many areas of the country are already extremely congested. In other areas of the country, however, lakes and rivers freeze over and the seasonal factors greatly affect capacity." *Report and Order* at paragraph 7. Nevertheless, the Commission recognized that "there may be cases where individual stations or systems of stations may have excess capacity on an hourly, daily or seasonal basis and could design a subsidiary service to vehicles which would ensure against interference to, or derogation of, maritime communications." *Report and Order* at paragraph 8. The Commission indicated that it would consider such requests for waiver of the rules on an *ad hoc* basis. The Commission has since granted several such waivers.[1] The Commission based the waivers on the fact that each station had limited marine traffic which was variable in terms of peak usage. The Commission allowed land mobile service to be offered to a limited number of vehicles during off peak periods on a strictly secondary basis. The Commission has received no complaints about these operations.

III. DISCUSSION

3. Authorization of service to land vehicles must be carefully scrutinized to ensure that maritime public correspondence, which is part of a safety service, is not impaired. WHU638 is located in New York state and is subject to seasonal climate conditions. Marine traffic for WHU638 generally serves recreational boats with heaviest use during the months of June to September, and during weekends and holidays of the rest of the year. In support of its request, Coastal indicates that it will provide services to a limited number of land vehicles, particularly during the week in the fall and winter when recreational boating use falls off. Coastal states that it will limit its service to the land vehicles to times when there is an operator on duty, to assure that the maritime vessels are provided priority use of the allocated channels.

4. We are waiving the rules, therefore, the rules to permit Coastal to provide subsidiary service to an estimated 100 land vehicles as requested. The waiver is contingent, however, on the conditions set forth below. Furthermore, such subsidiary service must cease within thirty days of the date of written notice if the Commission's staff determines that maritime communications are being impaired.

5. To minimize the potential for interference with other maritime safety or operational communications, the radio equipment installed in vehicles served by Coastal must be type accepted for use in the Maritime Services (Part 80), the Private Land Mobile Services (Part 90), or the Public Mobile Service (Part 22) and must be capable of operating only on the maritime public correspondence channels authorized for use by the public coast station. The mobile radios installed in vehicles may be crystal controlled with only the appropriate crystals installed, or frequency synthesized equipment with switch or front panel "blocks" to prevent operation on other channels. The radios installed in the vehicles must not be capable of being tuned by front panel operation to any channel other than those authorized for station WHU638. Electrical or mechanical modifications of equipment beyond the scope of Class I permissive changes are not necessary to satisfy this condition. Therefore, no filing with the Commission should be required regarding such changes. *See* Section 2.1001 of the Rules, 47 C.F.R. § 2.1001. Our intent is to prevent equipment installed in vehicles from operating on unauthorized frequencies by merely tuning such frequencies with external controls.

6. In the *Notice of Proposed Rules Making* (*NPRM*) in PR Docket No. 86-2, 51 Fed. Reg. 4552 (1986) at paragraph 8, the Commission indicated its intention to license subsidiary services on a "system basis." That is, it proposed that land vehicles utilize a public coast station's excess capacity to operate under the public coast station's license. Vehicle identification must consist of the public coast station's call sign and a numeric or alphabetical unit identifier. This increases the public coast station's incentive to control the

[1] *See*, for example, *In the matter of Request for waiver of Section 80.453 of the Rules to permit public coast station WHU247 to serve mobile vehicles on land*, 6 FCC Rcd 4846 (1991), *In the Matter of Global Communications, Inc.*, 7 FCC Rcd 2238 (1992) and *In the Matter of Custard, Inc. Request for waiver of Section 80.453 of the Rules to permit public coast station KFN to serve mobile vehicles on land*, 7 FCC Rcd 4515 (1992).

vehicles' communications because enforcement efforts will focus on the public coast station licensee rather than on individual vehicle operators. Also, authorizing subsidiary service on a system basis reduces paperwork requirements for both the public and the Commission by eliminating the need for separate licenses for each vehicle. Therefore, the license of Coastal will be modified accordingly. This method of licensing and identification will ensure that the licensee will take all necessary steps to prevent impairment of maritime services, consistent with the concerns expressed in PR Docket No. 86-2.

IV. CONCLUSION

7. In view of the above, IT IS ORDERED that the request for waiver of Section 80.453 of the Rules, 47 C.F.R. § 80.453, and modification of public coast station license WHU638 submitted by Coastal Marine Telephone to serve land mobile vehicles, on a secondary basis, IS GRANTED subject to the conditions set forth in paragraphs 5 and 6 above and subject to the condition that no impairment or interference is caused to maritime communications services.

FEDERAL COMMUNICATIONS COMMISSION

Robert H. McNamara
Chief, Special Services Division

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Teleport Transmission Holdings, Inc. — File No. I-T-C-92-036-T/C
161-DSE-TC-92(2)

Application for a Certificate Pursuant to Section 214 of the Communications Act, as Amended, to Acquire by Transfer of Control of Teleport Transmission Company Channels of Communication between the United States and INTELSAT Atlantic and Pacific Ocean Region Satellites for the Provision of INTELSAT Business Services and International Television Service.

MEMORANDUM OPINION AND ORDER AND AUTHORIZATION

Adopted: April 15, 1993; Released: May 4, 1993

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. The above-captioned application, filed on November 12, 1991, by Teleport Transmission Holdings (TTH), requests authority, pursuant to Sections 214 and 310(d) of the Communications Act of 1934, as amended (the Act), 47 U.S.C. §§214 and 310(d), to acquire by transfer of control of Teleport Transmission Company (TTC) channels of communication between existing and prospective satellite earth stations in the U.S. and INTELSAT Atlantic and Pacific Ocean Regions. TTH proposes that these channels of communication will be used to provide trans-Atlantic and trans-Pacific digital INTELSAT Business Service and video service ("IBS") and analog international television transmission and reception services ("ITS") within the coverage pattern of the designated INTELSAT satellites, including services between the U.S. and Asia, Australia, Europe and Latin America.[1] We grant this application for the reasons stated below.

II. BACKGROUND

2. TTC, a wholly-owned subsidiary of SatTime, Inc. (SatTime), holds radio licenses for satellite earth stations under Title III of the Act. It also holds a certificate, issued pursuant to Section 214 of the Act, to establish and operate channels of communication for the provision of IBS and ITS, in conjunction with two of its satellite earth stations.[2] TTH is a newly-formed U.S. corporation organized under the laws of the State of Colorado with 100 percent U.S. officers and 75 percent U.S. directors. The sole shareholder of TTH is Teleport Denver, Inc. ("TDI"), a U.S. corporation organized under the laws of Delaware with 100% U.S. officers and 75% U.S. directors. TDI, a holding company, is controlled and 95 percent owned by Intertel Communications, Inc. (INTERTEL) and 5 percent owned by Worldwide Condominium Development Ltd. (World Condo). INTERTEL is owned and controlled by Mr. William W. Becker, a Canadian citizen and President and a Director of INTERTEL, and family members (hereinafter collectively referred to as the Becker Group) through a 54% ownership interest.[3]

3. TTH seeks to acquire control of the subject channels of communication by acquiring all of the issued and outstanding capital stock of TTC from SatTime. Upon Commission approval of the application and immediately prior to consummation of the transaction, TDI as direct parent of TTH proposes to transfer 75% of TTH's capital stock under an irrevocable voting trust agreement to United Asset Management Services, Inc., ("UAMS"), a wholly-owned subsidiary of the United Bank of Denver National Association ("UBD"). We placed the application on public notice on November 20, 1991, and received no comments.

4. In subsequent amendments to its application,[4] TTH submitted a declaration by INTERTEL, in which the Becker Group pledges not to have greater than a 60% ownership interest in INTERTEL's capital stock and INTERTEL itself pledges (i) to reincorporate in the United States prior to consummation of the transaction, (ii) to have 75% U.S. officers and directors upon consummation of the transaction and (iii) to survey periodically the ownership of its outstanding capital stock to insure at least 40% ownership by U.S. citizens.[5]

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[1] The channels of communication that are the subject of this application were authorized to TTC. *See* 2 FCC Rcd 3213 (1987).

[2] TTC holds radio licenses for six satellite earth stations. Two satellite earth station licenses authorize the provision of IBS and ITS on a common carrier basis; the other four satellite earth station licenses authorize the provision of very small aperture terminal (VSAT) services on a non-common carrier basis under Title III of the Communications Act. *See* File Nos. 001291-DSE-P/L-87, 001292-DSE-P/L-87, 71-DSE-P/L-90, 72-DSE-P/L-90, 73-DSE-P/L-90 and 74-DSE-P/L-90. The latter four non-common carrier satellite earth station licenses are now part of a separate application for transfer of control to Commden, Ltd. *See* December 15, 1992 and April 2, 1993 Amendments.

[3] INTERTEL is currently a Canadian corporation, publicly-traded in both Canada and the United States, and World Condo is a privately-held Cayman Islands corporation, controlled by Mr. William W. Becker.

[4] *See* May 5, December 15, 1992 and April 2, 1993 Amendments containing declarations signed by Mr. William W. Becker, President of INTERTEL, and member of Becker Group which controls INTERTEL. The April 2, 1993 Amendment and the previously filed April 1, 1992 Amendment notified the Commission of (i) extensions of the expiration date of the Stock Purchase Agreement, (ii) INTERTEL's appearance on the American Stock Exchange and (iii) the election of Americans to INTERTEL's Board of Directors.

[5] Although the amendments would appear to obviate the need to address the proposed irrevocable voting trust, the applicant

III. DISCUSSION

5. This proposed transfer of control raises the issue of indirect alien ownership of a Title III licensee. As described below, the proposed transfer of control effectively results in 59 percent indirect alien ownership of TTC. The presence of this degree of aggregated indirect alien ownership of a common carrier radio licensee, such as TTC, triggers the application of Section 310(b)(4), which limits indirect alien ownership in, *inter alia*, common carrier licensees.[6]

6. In this instance, 100 percent of the capital stock of TTC's parent, TTH, is owned by TDI, whose capital stock is currently 100 percent alien-owned (95 percent by INTERTEL and 5 percent by World Condo, both alien corporations). Although INTERTEL is now a Canadian corporation, the parties represent that INTERTEL will reincorporate in the United States prior to consummation of the transaction. INTERTEL will then be 54 percent alien-owned by the Becker Group,[7] and have 75 percent U.S. directors and officers. The effect of INTERTEL's reincorporation will be to reduce the 100 percent indirect alien ownership of TTC to 59 percent.[8]

7. We first address the proposed use of an irrevocable voting trust as a means of insulating alien ownership for purposes of satisfying Section 310(b)(4) benchmarks. Initially, TDI proposes to create an irrevocable voting trust, prior to the transfer of control of TTC to TTH, as a means to insulate the alien ownership of TTH from the application of Section 310(b)(4)'s alien ownership benchmarks. UAMS would exercise legal title and control over the stock, with TDI as the beneficial owner, under the proposed irrevocable voting trust.

8. The Commission has previously addressed the use of an irrevocable voting trust as a means of insulating alien ownership from the application of Section 310(b). In *PrimeMedia Broadcasting, Inc.*, the Commission stated that it will not allow the formation of an irrevocable voting trust of which an alien is a beneficiary, or any other ownership instrument which insulates a foreign national, for the purpose of circumventing the alien ownership restrictions contained in Section 310 of the Act.[9] The Commission has also stated that the adoption of the equity benchmarks in Section 310(b) reflects Congressional concerns over substantial alien ownership of Commission licensees even where the alien's ownership interest is non-influential, passive or totally insulated in nature.[10] Thus, while we agree with TTH's general assertion that under Section 310(b)(4) the Commission may exercise discretion with regard to the degree of alien ownership or participation it will allow, we disagree that use of an irrevocable voting trust is sufficient to insulate an alien beneficiary from the application of Section 310(b)'s alien ownership benchmarks. Therefore, we find the Commission's rationale in *PrimeMedia* equally applicable to Section 310(b)(4) and we reject the use of an irrevocable voting trust as a means to avoid the application of Section 310(b)(4).

9. We next address the Section 310(b)(4) alien ownership issue raised by this application, as amended. TTH maintains that the actual 59 percent[11] indirect alien ownership is consistent with the public interest and fits within Commission precedent permitting indirect alien ownership in excess of the statutory benchmarks. Section 310(b)(4) expressly provides the Commission with discretion to determine whether it is in the public interest to allow indirect alien ownership or participation along a vertical ownership chain to exceed the statutory benchmarks.[12] The Commission authorizes indirect alien ownership or participation in excess of the Section 310(b)(4) statutory benchmarks on a case-by-case basis.[13] In instances where the Commission has authorized alien ownership or participation beyond the statutory benchmarks, the Commission has balanced the U.S. presence in one or more of the remaining areas (alien ownership, alien officers, or alien directors) addressed in

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continues to maintain that the use of an irrevocable voting trust is sufficient to insulate alien ownership for purposes of Section 310(b)(4).

[6] Section 310(b)(4) states, in pertinent part:

> (b) No broadcast or common carrier or aeronautical en route or aeronautical fixed radio station license shall be granted or held by --
>
> * * *
>
> (4) any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license.

[7] The Becker Groups pledges not to have an ownership interest in INTERTEL greater than 60%. Furthermore, as INTERTEL obtains additional financing for TDI, the Becker Group's ownership interest in INTERTEL's capital stock is likely to be diluted. *See* Declarations, May 5 and December 15, 1992 and April 2, 1993 Amendments.

[8] We arrive at 59% by combining the Becker Group's 54 percent indirect ownership interest in TDI (through INTERTEL's 95 percent holding in TDI) with World Condo's 5 percent direct ownership interest in TDI. Under the proposed ownership structure, we note that INTERTEL's pledge to ensure at least 40 percent U.S. ownership of its capital stock, combined with World Condo's 5 percent ownership interest, effectively caps the indirect alien ownership of TTC at 65 percent.

[9] PrimeMedia Broadcasting, Inc., 3 FCC Rcd 4294 (1988) (*PrimeMedia*). TTH asserts that in *PrimeMedia* the Commission's analysis primarily focussed on Section 310(b)(3). However, we do not read the scope of the Commission's decision so narrowly as the discussion in *PrimeMedia* pertained to Section 310(b) as a whole. *See also* n.10, *infra*.

[10] *See Wilner & Scheiner*, 103 FCC 2d 511 (1985), reconsidered in part, 1 FCC Rcd 12, (1986); *Citizenship Requirements of Licensee*, 61 RR 2d 298 (1986). Citing *PrimeMedia*, the Commission reiterated that "the equity benchmarks adopted in Section 310(b) reflect a Congressional concern over the persons or companies controlling Commission licensees even in circumstances where the alien's ownership interest is non-influential in nature or does not confer actual control." *See Continental Cellular*, 5 FCC Rcd 691 (1990); *affirmed in relevant part Continental Cellular*, 6 FCC Rcd 6834 (1991).

[11] *See* n.8, *supra*.

[12] *See* n.10, *supra*. Under Section 310(b)(4), the aggregate of alien equity interests in a parent corporation, which in turn controls a corporate licensee, may be up to 25 percent and not require a Section 310(b)(4) analysis.

[13] *PrimeMedia* at 4295.

Section 310(b)(4).[14] In *GRC Cablevision, Inc.*, for example, where the Commission allowed 60 percent alien ownership of a parent, it specifically noted that the majority of the parent's Board of Directors was comprised of U.S. citizens and the parent itself was a U.S. corporation. Furthermore, the Common Carrier Bureau noted in *Millicom,*[15] where it approved greater than 25 percent alien presence on the Board of Directors, that 90 percent of the shareholders and a majority of the Board were U.S. citizens. With respect to the presence of alien officers in a corporation controlling a licensee, the Commission has found that where the alien officers will not be involved in the activities of the licensee's operations or that control of the licensee by the 8 alien officer is sufficiently remote, the public interest is not adversely affected.[16] The application before us presents a similar balance of Section 310(b)(4) elements.

10. In this case, TTC will be controlled by INTERTEL. As previously noted, the parties have represented that INTERTEL will reincorporate in the United States to become a U.S. corporation prior to consummation of the transaction, thereby reducing the otherwise 100 percent indirect alien ownership of TTH to 59 percent. This degree of indirect alien ownership is consistent with previous exercises of Commission discretion pursuant to 310(b)(4).[17] In addition to being a U.S. corporation, INTERTEL will have at the time of the transfer of control 75 percent U.S. directors and officers. We note that the two intervening subsidiaries between INTERTEL and TTC will have 100 percent U.S. officers. We thus find that the 25 percent alien officer participation in INTERTEL is sufficiently remote as to not adversely affect the public interest.[18] Finally, we note that the two licenses involved are common carrier licenses (File Nos. 001291-DSE-P/L-87 and 001292-DSE-P/L-87) and that TTC, the licensee, will exercise therefore no control over the content of the transmissions. Based on the specific facts of this application, including the pledges contained in the subsequent amendments, we find no public interest reason to deny TTH's request to acquire TTC.

11. Accordingly, IT IS ORDERED that we consent to the transfer of control of the licensee, TTC, to TTH subject to the conditions that the Becker Group not have greater than a 60% ownership interest in INTERTEL's capital stock and that INTERTEL (i) reincorporate in the United States prior to consummation of the transaction, (ii) have 75% U.S. officers and directors upon consummation of the transaction and (iii) survey periodically the ownership of its outstanding capital stock to insure at least 40% ownership by U.S. citizens.

12. IT IS FURTHER ORDERED that TTH shall file with the Commission proof of compliance with the conditions set forth above within 30 days of consummation of the transaction.

13. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of this Order's public notice date (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

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[14] *See, e.g., GRC Cablevision, Inc.*, 47 F.C.C. 2d 467, 30 R.R. 2d. 827 (1974); *LCI Communications, Inc.*, Mimeo No. 3491 (Mar. 31, 1986); *Millicom*, 4 FCC Rcd 4846 (1989); and *IDB Communications Group, Inc.*, 6 FCC Rcd 4652 (1991).

[15] *See Millicom*, 4 FCC Rcd 4846 (1989).

[16] *See e.g., GCI Liquidating Trust*, 7 FCC Rcd 7641 (1992); *Data General Corporation*, Mimeo No. 3385 (March 26, 1986); *International Telephone and Telegraph Corp.*, 67 F.C.C. 2d 604 (1978). *See also, McCaw Cellular Communications, Inc.*, 5 FCC Rcd 6258 (1990); *Continental Illinois Venture Corporation*, 6 FCC Rcd 1944 (1991).

[17] *See, GRC Cablevision, Inc.*, 47 F.C.C. 2d 467, 30 R.R. 2d. 827 (1974) and *GCI Liquidating Trust*, 7 FCC Rcd 7641 (1992).

[18] *See* n.16, *supra*.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-324

In the Matter of

Amendment of Section 73.202(b), RM-7314
Table of Allotments,
FM Broadcast Stations.
(Saranac Lake, New York)

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: April 23, 1993; Released: May 4, 1993

By the Chief, Policy and Rules Division:

1. The Commission has before it a Petition for Reconsideration of the *Report and Order*, 6 FCC Rcd 5121 (1991), filed by WNBZ, Inc. ("WNBZ"), licensee of Stations WNBZ(AM) and WDGE(FM), Saranac Lake, New York. The *Report and Order* allotted Channel 292C3 to Saranac Lake as the community's second local FM service, at the request of Thomas G. Davis.

2. In its petition for reconsideration, WNBZ requested that the Commission delete Channel 292C3 from Saranac Lake. In a later filed pleading, WNBZ requested that its petition for reconsideration be held in abeyance pending Commission action on its application (File No. BPH-9111271C) for construction permit seeking authority to operate Station WNBZ on Channel 292C3 in lieu of its presently authorized Channel 269A. In that pleading WNBZ also requested that its petition for reconsideration be dismissed if the referenced application for construction permit were granted. On January 26, 1993, the Commission granted the application and issued WNBZ a construction permit specifying operation on Channel 292C3.

3. In view of the foregoing, IT IS ORDERED, That the Petition for Reconsideration filed by WNBZ, Inc., IS HEREBY DISMISSED.

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-11

In the Matter of

Amendment of Section 73.202(b), RM-8164
Table of Allotments,
FM Broadcast Stations.
(Spokane, Washington)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 26, 1993; Released: May 4, 1993

By the Chief, Allocations Branch:

1. At the request of Melinda Boucher Read ("petitioner"), permittee of Station KSPO(FM), Spokane, Washington, the Commission has before it the *Notice of Proposed Rule Making*, 8 FCC Rcd 772 (1993), proposing the substitution of Channel 245C3 for Channel 245A at Spokane and the modification of Station KSPO(FM)'s construction permit accordingly. Petitioner filed comments in support of the proposal reaffirming her intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by the allotment of Channel 245C3 at Spokane, since it would provide the community with a wide coverage area FM service. Our engineering analysis has determined that Channel 245C3 can be allotted to Spokane in compliance with the Commission's minimum distance separation requirements for domestic allotments at petitioner's specified site.[1] However, as indicated in the *Notice*, the allotment is short-spaced to vacant Channel 245A, Salmo, British Columbia. Accordingly, since Spokane is located within 320 kilometers (200 miles) of the U.S.-Canadian border and the allotment is short-spaced to a vacant Canadian allotment, Canadian concurrence has been obtained for Channel 245C3 as a specially negotiated allotment. As requested, we will also modify Station KSPO(FM)'s construction permit to specify operation on Channel 245C3 at Spokane.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 18, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Spokane, Washington	225C, 229C, 245C3, 251C, 255C, 260C, 280C2, 284A, 289C, 300C

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of Melinda Boucher Read for Station KSPO(FM), Spokane, Washington, IS MODIFIED to specify operation on Channel 245C3, in lieu of Channel 245A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Melinda Boucher Read, permittee of Station KSPO(FM), is required to submit a rule making fee in addition to the fee required for the applications to effect the upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 245C3 at Spokane are North Latitude 47-41-39 and West Longitude 117-20-03.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-292

In the Matter of

Amendment of Section 73.202(b), RM-8135
Table of Allotments,
FM Broadcast Stations.
(Milton-Freewater, Oregon)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 26, 1993; Released: May 4, 1993

By the Chief, Allocations Branch:

1. At the request of Alexandra Communications ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making,* 7 FCC Rcd 8550 (1992), proposing the substitution of Channel 250C2 for Channel 250C3 at Milton-Freewater, Oregon, and the modification of Station KLKY(FM)'s construction permit to specify operation on the higher class channel. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 250C2 for Channel 250C3 at Milton-Freewater since it could enable Station KLKY(FM) to expand its coverage area. Channel 250C2 can be allotted to Milton-Freewater in compliance with the Commission's minimum distance separation requirements with a site restriction of 17.8 kilometers (11 miles) northeast to accommodate petitioner's desired transmitter site.[1] As proposed, we will also modify Station KLKY(FM)'s construction permit to specify Channel 250C2.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 18, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Milton-Freewater, Oregon	250C2

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Alexandra Communications for Station KLKY(FM), IS MODIFIED to specify operation on Channel 250C2, in lieu of Channel 250C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order,* the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Alexandra Communications, permittee of Station KLKY(FM), is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 250C2 at Milton-Freewater are North Latitude 45-59-04 and West Longitude 118-10-08.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-125

In re Applications of

(Eldon F. Hestand, John C. McVey, and Michael S. Morris d/b/a) LAND RUSH COMMUNICATIONS (hereafter "Land Rush") — File No. BPH-910705MK

ROBERT V. CLARK (hereafter "Clark") — File No. BPH-910708MD

For Construction Permit for a New FM Station on Channel 273A (102.5 MHz) in Arkansas City, Kansas

HEARING DESIGNATION ORDER

Adopted: April 21, 1993; Released: May 5, 1993

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Land Rush.* Land Rush proposes to sidemount its antenna on an existing 54.9 meter tower in Creswell, Kansas. The tower, Land Rush indicates, currently supports various two-way communications antennas. Our engineering study indicates that this proposal may significantly exceed the ANSI guidelines for human exposure to radio frequency (RF) radiation as outlined in OST Bulletin No. 65 (October 1985). Consequently, we are concerned that Land Rush may have failed to comply with the environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). Under the rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. 47 C.F.R. § 1.1307 states that an EA must be prepared if the proposed operation would cause exposure to workers or the general public to levels of RF radiation exceeding specific standards. Since Land Rush failed to indicate how workers engaged in maintenance and repair would be protected from exposure to levels exceeding the ANSI guidelines, it will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. *See generally,* OST Bulletin No. 65 (October, 1985) entitled "Evaluating Compliance With FCC-Specified Guidelines For Human Exposure to Radiofrequency Radiation," at 28. Therefore, Land Rush will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.,* 71 FCC 2d 229 (1979), *recon. denied sub nom Old Pueblo Broadcasting Corp.,* 83 FCC 2d 337 (1980).

3. *Other matters.* Data submitted by the applicants indicate there would be a significant difference in the size of the areas which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

4. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

5. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to Land Rush in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

2. To determine which of the proposals would, on a comparative basis, better serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

6. IT IS FURTHER ORDERED, That in accordance with paragraph 2 hereinabove, Land Rush shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

7. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief,

Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington D.C. 20554.

8. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

9. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-126

In re Applications of

EDUCATIONAL MEDIA FOUNDATION OF BRYAN/ COLLEGE STATION
(hereafter "Educational Media")
Bryan, Texas
Channel 210A
File No. BPED-910924MC

BRAZOS EDUCATIONAL RADIO
(hereafter "Brazos")
College Station, Texas
Channel 209
File No. BPED-920413MF

For Construction Permit
for a New Noncommercial Educational
FM Station

HEARING DESIGNATION ORDER

Adopted: April 21, 1993; Released: May 5, 1993

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new, non-commercial, educational FM station.

2. *Preliminary Matters: Educational Media.* On April 14, 1992, Channel 6, Inc. ("Channel 6"), the licensee of television station KCEN-TV, Temple, Texas, filed a "Petition to Deny or Hold in Abeyance" against Educational Media's application, stating that the applicant "failed to respond to a February 24, 1992 staff letter directing it to demonstrate that it adequately protects KCEN-TV" and that the Commission should either dismiss the application or hold it in abeyance until the information is submitted.[1]

3. On May 13, 1992, the applicant amended its proposal to supply the necessary information regarding interference with KCEN-TV and protection to workers and others with authorized access to the tower.[2] In its July 29 "Supplement to Petition to Deny or Hold in Abeyance," Channel 6 alleges that the Educational Media proposal still does not comply with Section 73.525 because it did not contain the population figures for the entire interference area created by the Bryan proposal. Channel 6 states that this information is necessary because, if TV translator station K63DL, which carries station KDEN-TV, is forced off the air, the NCE-FM must modify its operation to comply with Section 73.525 without the translator adjustment. Without the population figures, claims Channel 6, "the Commission would have no way of determining whether or not the NCE-FM would have to reduce power in the event the translator is taken off the air."

4. The Commission's TV Channel 6 rules 47 C.F.R. § 73.525, reads in pertinent part:

> (i) if any part of the predicted interference area is within the Grade A field strength contour (§ 73.683) of a TV translator station carrying the affected TV Channel 6 station, the number of persons within that overlap area will be subtracted, provided the NCE-FM construction permit and license will contain the following condition:
>
> (A) When the TV translator station ceases to carry the affected TV Channel 6 station's service and the cessation is not the choice of the affected TV Channel 6 station, the NCE-FM station will modify its facilities, within a reasonable transition period, to meet the requirements of this section which would have applied if no adjustment to population for translator service had been made in its application.

47 C.F.R. § 73.525(e)(3)(i).

The majority of the interference area will occur within the Grade A contour of translator station K63DL. The number of persons in the interference area outside the K63DL contour is listed as 1197 in the August 13 amendment, well below the maximum of 3000 persons permitted by Section 73.525. Channel 6 does not dispute these figures, but indicates that the applicant must list the population within the entire interference area.

5. Section 73.525 does not require such a submission. Applicants must simply demonstrate that the total number of persons in the interference area, after making the pertinent subtractions, is less that 3000.[3] Educational Media has done this. Its application can therefore be granted with the pertinent conditions, and Channel 6's petitions will be denied.

6. *Brazos.* On September 22, 1992, Channel 6 also filed against Brazos a "Petition to Hold in Abeyance, or Alternatively, to Associate Supplemental Information with Application." Channel 6 argues that Brazos should amend its application to specify the number of persons within the

[1] On July 29, 1992, Channel 6 filed a supplement to its April 14 petition against Educational Media's application; On August 13, 1992, Educational Media filed an opposition to Channel 6's petition; and, on August 25, 1992, Channel 6 filed a response to Educational Media's August 13 opposition.

[2] On April 15, the applicant filed a letter stating that while it had been coordinating with its engineers, it had taken longer that 30 days to reach resolution of the matter. The applicant was given by telephone until May 15, 1992 to file its amendment. The applicant filed an additional technical amendment on August 13, 1992, which purports to "correct an error in the methods used to calculate interference to KCEN-TV. engineering exhibit E-1, at p. 1.

[3] For the record, we note that both parties agree that the total number of persons within the interference area is 9499.

proposed Channel 6 interference areas. Channel 6 calculates the number of people to be 76,263 persons, which it claims is twenty five times the number allowable under 47 C.F.R. § 73.525(c). On September 29, 1992, Brazos filed its "Response" to Channel 6's petition.

7. However, as noted by both Channel 6 and Brazos, Brazos' proposal is in compliance with the Commission's TV 6 restrictions. The entire TV 6 interference area proposed by Brazos is within the Grade A contour of Television translator station K63DL, Bryan, Texas, which carries KCEN-TV. Therefore, the population within the entire interference area may be discounted, and the Brazos application may be granted with the appropriate condition.[4]

8. *Other matters.* Section 73.1125 of the Commission's Rules requires that the main studio of an FM station be located within the station's 3.16 mV/m (70 dBU) contour, but on a showing of good cause may be located outside that contour. Brazos proposes to locate its main studio outside that contour and gives the following justification: Its main studio is to be located within the city of license pursuant to Section 73.1125(a)(3). Accordingly, Brazos is in compliance with the main studio rules.

9. In response to Item 4, Section II, FCC Form 340, Educational Media failed to provide the required exhibit describing how the proposed station will be used, in accordance with 47 C.F.R. Section 73.503, for the advancement of an educational program. However, Educational Media's exhibit no. 1 which was provided in response to Item 2, Section II, FCC Form 301 (requesting a description of the applicants's organizational structure), seems to also describe the information required for Item 4. Additionally, Exhibit II, Educational Media's programming statement, appears to indicate its committment to advancement of its stated Educational Purpose. Accordingly, Educational Media will not be required to submit an amendment which clarifies this discrepancy.

10. Educational Media amended its application on May 13, 1992, and on August 13, 1992. The amendments were filed after the "A" cut-off-date, the last date for filing minor amendments as of right. However, they were filed in response to a staff request for information dated February 24, 1992. Under Section 73.3514(b) of the Commission's Rules, which governs such responses, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

11. Inasmuch as it appears that there would be a significant difference in the size of the areas and populations which would receive service from the proposals, and since this proceeding involves competing applicants for noncommercial educational facilities, the standard areas and populations issue will be modified in accordance with the Commission's prior action in *New York University*, FCC 67-673, released June 8, 1967, 10 RR 2d 215 (1967). Thus the evidence adduced under this issue will be limited to available noncommercial educational FM signals within the respective service areas.

12. Neither of the Applicants have indicated that an attempt has been made to negotiate a share-time arrangement. Therefore, an issue will be specified to determine whether a share-time arrangement between the applicants would be the most effective use of the frequency, and thus better serve the public interest. *Granfalloon Denver Educational Broadcasting, Inc.*, 43 Fed. Reg. 49,560, published October 24, 1978. In the event that this issue is resolved in the affirmative, an issue will also be specified to determine the nature of such an arrangement. It should be noted that our action specifying a time-sharing issue is not intended to preclude the applicants, either before the commencement of the hearing or at any time during the course of the Hearing, from participating in negotiation with a view toward establishing a share-time arrangement.

13. The respective proposals, although for different communities, would serve substantial areas in common. Consequently, in addition to determining, pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service, a contingent comparative issue will also be specified.

14. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

15. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine: (a) the number of other reserved channel noncommercial educational FM services available in the proposed service area of each applicant, and the area and population served thereby; (b) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest and, if so, the terms and conditions thereof; and (c) in light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

2. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to Section 307(b), the extent to which each of the proposed operations will be integrated into the overall cultural and educational objectives of the respective applicants; and whether other factors in the record demonstrate that one applicant will provide a superior FM educational broadcast service.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

[4] We note that although we will not require the figures, the parties are in agreement as to the population residing in the interference area.

16. IT IS FURTHER ORDERED, That the "Petition to Deny or Hold in Abeyance" filed by Channel 6, on April 14, 1992 against Educational Media's application, and, the "Petition to Hold in Abeyance, or Alternatively, to Associate Supplemental Information with Application" filed by Channel 6 on September 22 against Brazos' application, ARE DENIED.

17. IT IS FURTHER ORDERED, That the amendments discussed in Paragraph 10, above, ARE ACCEPTED to the extent indicated herein.

18. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington D.C. 20554.

19. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of the Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the dated fixed for hearing and to present evidence on the issues specified in this Order.

20. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-127

In re Applications of

JANICE M. SCANTLAND File No. BPH-920113MC
(hereafter "Scantland")

ROBERT G. CASAGRANDE File No. BPH-920115ME
(hereafter "Casagrande")

For Construction Permit for a
New FM Station on Channel 282A
in Richwood, Ohio

HEARING DESIGNATION ORDER

Adopted: April 22, 1993; Released: May 5, 1993

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.[1]

2. Robert G. Casagrande is an officer, director and 50% owner of MM Group, Inc., licensee of WWHT(FM) in Marysville, Ohio. Casagrande has indicated his intent to terminate his relationship with WWHT(FM) in the event of grant of the referenced application. Accordingly, in the event of grant of his application, Casagrande will be required to sever all connection with WWHT(FM) prior to the commencement of program test authority.

3. Scantland petitioned for leave to amend her application on March 31, 1993. This was filed after May 4, 1992, the last day for filing amendments as of right. The subject amendment was accompanied by the good cause showing required by 47 C.F.R. § 73.3522(a)(2), and consequently, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

4. Section VII, Item 3 of FCC Form 301 requires that an applicant certify that it has obtained assurance of the proposed site or structure by contacting the owner or person possessing control of the site or structure. In its amended Section V-B, filed March 31, 1993, Scantland has proposed a change in transmitter sites and has not submitted such certification. Accordingly, a site availability issue will be specified.

5. Since no determination has been received from the Federal Aviation Administration as to whether the antenna proposed by Scantland would constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding.

6. Section II, Item 6 of FCC Form 301 (June 1989) requires that an applicant specify its residence (number, street, city, state). Scantland has not completed Item 6 correctly. Scantland's application gives a post office box number as her residence address. Accordingly, Scantland must submit as amendment which gives all the information required by Section II, Item 6 to the presiding Administrative Law Judge after this Order is released.

7. Data submitted by the applicants indicate that there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

8. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

9. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Scantland has reasonable assurance that the transmitter site specified will be available to it.

2. To determine whether there is a reasonable possibility that the tower height and location proposed by Scantland would constitute a hazard to air navigation.

3. To determine which of the proposals would, on a comparative basis, better serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

10. IT IS FURTHER ORDERED, That in the event of grant of Casagrande's application, Robert G. Casagrande will be required to sever all connections with WWHT(FM), Marysville, Ohio, prior to the commencement of program test authority.

11. IT IS FURTHER ORDERED, That the petition for leave to amend filed by Scantland IS GRANTED, and the corresponding amendment IS ACCEPTED to the extend indicated herein.

[1] A third mutually exclusive applicant, Vernon R. Baldwin (BPH-920113MD), was dismissed on August 31, 1992, for failure to pay the requisite hearing fee.

12. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

13. IT IS FURTHER ORDERED, That Scantland shall submit an amendment which contains the information required by Section II, Item 6 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this order.

14. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington D.C. 20554.

15. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order. Pursuant to Section 1.325(c) of the Commission's Rules, within five days after the date established for filing notices of appearance, the applicants shall serve upon the other parties that have filed notices of appearance the materials listed in: (a) the Standard Document Production Order (see Section 1.325(c)(1) of the Rules); and (b) the Standardized Integration Statement (see Section 1.325(c)(2) of the Rules), which must also be filed with the presiding officer. Failure to so serve the required materials may constitute a failure to prosecute, resulting in dismissal of the application. *See generally Proposals to Reform the Commission's Comparative Hearing Process* (Report and Order in Gen. Doc. 90-264), 6 FCC Rcd 157, 160-1, 166, 168 (1990), *Erratum*, 6 FCC Rcd 3472 (1991), *recon. granted in part*, 6 FCC Rcd 3403 (1991).

16. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-61

In re Applications of

LRB BROADCASTING	File No. BPH-901218MI
DAVID WOLFE	File No. BPH-901219MI
ZENITRAM COMMUNICATIONS, INC.	File No. BPH-901220MG

For Construction Permit for
New FM Station, Channel 288A,
Brockport, New York

MEMORANDUM OPINION AND ORDER

Adopted: April 28, 1993; Released: May 5, 1993

By the Commission:

1. We have considered an application filed by Zenitram Communications, Inc. on November 6, 1992 for review of the Review Board's memorandum opinion and order, 7 FCC Rcd 6459 (1992), affirming the ALJ's dismissal of its application for construction permit.[1] We agree with the Board that the dismissal should be sustained, but additional explanation for the holding is called for in response to some of Zenitram's arguments.

2. The ALJ and the Board identified two procedural derelictions as grounds for dismissal. First, Zenitram failed to file a notice of appearance (or a request for extension supported by a good-cause showing) within 20 days of the mailing of the Hearing Designation Order, pursuant to 47 C.F.R. §1.221(c). Its notice of appearance was filed on May 18, 1992, fourteen days after the deadline. The ALJ concluded that there was no good cause for the late filing of the notice, and the Board concurred in that determination and held that this alone justified dismissal. *Id.* at 6460 ¶11. Second, Zenitram failed to comply with directions in the Hearing Designation Order for each applicant to serve upon the other applicants, within five days after the filing deadline for notices of appearance, documents of the sort described in 47 C.F.R. §1.325(c)(1) and an integration statement pursuant to 47 C.F.R. §1.325(c)(2). Zenitram filed its integration statement one day late and did not file the documents required by §1.325(c)(1) until June 2, 1992, 22 days late. *Id.* at 6459 ¶ 5. The lower decisions hold that the latter default prejudiced the discovery rights of the competing applicants and would have tended to delay resolution of the case had Zenitram's application been retained. *Id.* at 6461 ¶14.

3. Zenitram argues that the Board erred by failing to properly weigh the undisputed fact that Zenitram had filed a notice of appearance more than nine months *prior* to the mailing of the Hearing Designation Order and evidence that Zenitram had pre-paid the hearing fee prior to the release of the HDO. The Board reasoned that those matters are of no moment because the rules require notices of appearance to be filed within a specified period after the HDO's mailing, rather than before. *Id.* at ¶13. Zenitram argues, however, that in light of its prior filing of a notice of appearance and asserted pre-payment of the fee its failure to file a timely post-designation notice should be regarded as a minor technicality.

4. We disagree. Failure to file a notice of appearance within 20 days of the mailing of the HDO (or to file, prior to the same deadline, a petition for acceptance of a later-filed notice) is to be distinguished from other procedural derelictions which may warrant dismissal, as the imposition of the penalty of dismissal for defaults of the former kind is prescribed by regulation rather than merely left to the discretionary initiative of ALJs. As Zenitram neither filed a notice within the period specified by §1.221(c) nor filed a petition before the expiration of that period for acceptance of a late-filed notice, it was incumbent upon it, if it would avoid the prescribed penalty, to submit a motion for waiver supported by a sufficient showing for such relief. As it does not allege that it requested such relief or that grounds for granting it exist, its appeal is facially deficient.

5. Furthermore, the late filing of the post-designation notice was no mere technicality, notwithstanding that Zenitram had filed a similar notice and assertedly paid the hearing fee prior to designation. Under the rules, applicants who pre-pay the fee are entitled to a full refund if their applications are later dismissed for failure to file a §1.221 notice of appearance. 47 C.F.R. §1.1111(c). Thus, until it filed a post-designation notice, there was no more assurance that Zenitram would participate in the hearing than there would have been had it not filed a pre-designation notice or pre-paid the fee. And because it retained the option of recovering the fee while it refrained from filing a post-designation notice of appearance, Zenitram was in essentially the same position as the dismissed applicant in *Silver Springs Communications*, 3 FCC Rcd 5049 (Rev. Bd. 1988), *rev. den.*, 4 FCC Rcd 4917 (1989), where the Board correctly held that to allow an applicant to participate in a multi-party comparative hearing after having filed a late notice of appearance would "inevitably lead to abuse of the Commission's processes, applicant gamesmanship, and unfair advantage." *Id.* at 5050 ¶ 7. It is a considerable advantage to know who else will compete in a comparative hearing before irrevocably incurring the expense of the hearing fee. To allow applicants to gain this advantage by violating a regulatory deadline would be unfair to competing applicants who abide by the filing rule and would encourage applicants in future cases to seek to take similar liberties.[2]

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[1] On November 23, 1992, David Wolfe filed an opposition to Senitram's application for review.

[2] Zenitram is therefore incorrect in maintaining that this case is analogous to *Nancy Naleszkiewicz*, 7 FCC Rcd 1797 (1992), where we suggested that waiver of the §1.221(c) deadline was appropriate. As we explained in that opinion, *id.* at 1800 ¶22, the situation based on the prehearing record in that case was materially different from the facts of *Silver Springs* (and likewise from the facts of this case), in that the proceeding was not comparative but had instead been instituted merely to deter-

6. Zenitram also argues that the Board ignored a precedent that stands for the proposition that isolated procedural defaults due to an attorney's negligence may be excused if the applicant promptly acts to prevent further derelictions by discharging the attorney and hiring a substitute, citing *Maricopa County Community College District*, 4 FCC Rcd 7754 (Rev. Bd. 1989). Zenitram contends that this principle should apply here because the defaults at issue were not presaged by a pattern of derelictions and because it secured new counsel after the ALJ issued the dismissal order. It is not clear, however, that the defaults at issue here are merely due to negligence on the part of Zenitram's previous attorney. The only evidence presented concerning the failure to file a timely notice of appearance consists of an unattested and uncorroborated statement from the former attorney alleging that the notice was given to an unnamed courier in time for delivery before the deadline, without saying exactly when and where the transfer to the courier occurred or whether the applicant's principals were aware of the relevant circumstances. Regarding the failure to meet the deadline for serving an integration statement and the documents specified by §1.325(c)(1), Zenitram offered no explanation whatever to the ALJ or the Board, 7 FCC Rcd at 6459 ¶ 5, nor does it offer one now in its application for review.[3] Thus, this case is easily distinguishable from *Maricopa*, where the applicant gave reasonable justification for its dereliction and provided sufficient information about the relevant circumstances to support a finding that there was no complicity on its part in the procedural misfeasances.

7. ACCORDINGLY, IT IS ORDERED that the application for review filed by Zenitram Communications, Inc. on November 6, 1992 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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mine whether a winning cellular lottery applicant was basically qualified and hence there was no apparent motive of "gamesmanship" to be served by delayed filing of the notice.

[3] Zenitram is mistaken in insisting that the untimely production of documents bearing on its basic qualifications was harmless because no hearing issues have been specified concerning such matters and hence the other parties were not entitled to investigate them through discovery. The fact remains that its adversaries clearly had a right to receive the information within 20 days of designation, and the delay in its production was disruptive insofar as it thwarted investigation, with or without the aid of discovery, to determine whether questions could be raised that would warrant enlarging the hearing issues.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GTE SPACENET CORPORATION — File No. 7-DSS-ML-92

Application to Modify Temporary Authority for GSTAR III satellite

ORDER AND AUTHORIZATION

Adopted: April 29, 1993; **Released: May 5, 1993**

By the Chief, Domestic Facilities Division:

I. INTRODUCTION

1. GTE Spacenet Corporation (GTE Spacenet) has applied to modify its authority to operate GSTAR III at inclination excursions greater than 5^0. Comments were filed by GE American Communications, Inc. (GE Americom) and Hughes Communications Galaxy, Inc. (HCG) and reply comments were filed by GTE Spacenet. For the reasons discussed below, GTE Spacenet's application is granted.

II. BACKGROUND

2. GTE Spacenet was authorized to construct its GSTAR III satellite as an on-ground spare in 1981.[1] GTE Spacenet was granted authority to launch GSTAR III into the 136^0 W.L. orbital location in 1985.[2] An operational malfunction shortly after GSTAR III's launch in September 1988 resulted in the satellite achieving an elliptical, rather than a geostationary, orbit. Over a one year period, GTE Spacenet maneuvered the spacecraft into position to achieve proper orbit, significantly reducing the satellite's station-keeping fuel and useful life.[3] On March 2, 1990 GTE Spacenet was granted temporary authority to operate GSTAR III with an inclination excursion[4] up to 5^0 and to operate the satellite temporarily at 93^0 W.L., subject to certain conditions.[5] By operating GSTAR III with an inclined orbit, GTE Spacenet is able to conserve fuel by not maintaining north-south stationkeeping and, therefore, extend the satellite's useful life.

3. GTE Spacenet now seeks to operate GSTAR III at inclination excursions greater than 5^0 so that GSTAR III is able to operate as long as possible. GTE Spacenet estimates the satellite's end-of-life to be sometime in 1997; however, it will exceed the 5^0 orbital inclination in 1993. GTE Spacenet states that it serves numerous customers on GSTAR III and has requests from prospective customers who desire commitments through 1997.

4. GE Americom and HCG do not oppose the removal of the 5^0 inclination excursion limitation, but instead raise concerns regarding the rights to 93^0 W.L. GE Americom is concerned that GTE Spacenet's temporary authority would give GTE Spacenet preferential rights to 93^0 W.L. for regular operation, and would delay the regular assignment of authority to the 93^0 W.L. orbital location until 1997. HCG is concerned about the effect the continued operation of GSTAR III, beyond its ten-year license term, will have on other satellites. GTE Spacenet, in its reply comments, recognizes that in a subsequent processing round, the 93^0 W.L. location would be available for assignment to another newly constructed satellite, yet, asks the Commission to take into consideration the fuel utilization involved in relocating GSTAR III to another orbital location.

III. DISCUSSION

5. The 5^0 inclination excursion limitation contained in GTE Spacenet's temporary authorization was based on the former International Frequency Registration Board's (IFRB) interpretation of the definition of a geostationary satellite set out in the International Telecommunication Union(ITU) Radio Regulations.[6] The ITU Radio Regulations stipulate that any fixed-satellite that is not operating in geostationary satellite orbit(GSO) may not cause interference into adjacent satellites, may not claim protection from any interference from adjacent geostationary satellites, and is at risk to lose the right to use its orbit location to a satellite operating in the GSO.[7] The IFRB historically interpreted a geostationary satellite as one operating in a geosynchronous orbit with an inclination excursion of 5^0 or less. In response to a request from the United States Department of State, the IFRB reviewed its Rules of Procedure. Based on its own review and International Radio Consultative Committee (CCIR) studies, the IFRB has decided to change its interpretation regarding the 5^0 inclina-

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[1] GTE Satellite Corporation, 84 FCC 2d 562 (1981) (Authorization Order). GSTAR III provides fixed-satellite services in the 12/14 GHz bands.

[2] *See* GTE Spacenet Corporation, 103 FCC 2d 644 (1985); Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service, 50 FR 35228 (August 30, 1985).

[3] Communications satellites will drift in orbit due to the gravitational pull from the sun, the moon, other celestial bodies, and the oblate shape of the earth. To control this orbital drift and to keep the satellites relatively stationary to an observer on Earth, periodic maneuvers are required that reverse the drift by expending a small amount of fuel. This contains the satellite within a pre-defined east-west and north-south boundary around its nominal orbital location. The total available fuel on board the satellite therefore largely determines the useful lifetime of the spacecraft.

[4] The inclination excursion is the extent to which the satellite orbital plane is tilted with respect to the equatorial plane of the Earth. With increased inclination excursions, a periodic correction in spacecraft attitude is needed to achieve a stationary antenna pattern on the Earth's surface.

[5] *See* GTE Spacenet Corporation, 5 FCC Rcd 1182 (Com. Car. Bur.1990).

[6] ITU RR No. 180 defines a geosynchronous satellite as an Earth satellite whose period of revolution is equal to the period of rotation of the Earth about its axis. ITU RR No. 181 defines a geostationary satellite as a geosynchronous satellite whose circular and direct orbit lies in the plane of the Earth's equator and which thus remains fixed relative to the Earth; by extension, a satellite which remains approximately fixed relative to the Earth.

[7] ITU RR No. 2613.

tion excursion limitation for the geostationary satellite orbit.[8] Accordingly, we modify GSTAR III's authorization to remove the 5^0 inclination excursion limitation.

6. With respect to the concerns raised regarding the 93^0 W.L. location, the Bureau, recognizing the public benefit, has authorized the use of inclined orbit operation to extend the operational lifetime of older satellites until state-of-the-art satellites authorized to operate from the same location are ready to be launched.[9] However, these temporary authorizations were not intended to impede the introduction of new satellite technology. Thus, authorizations to operate in inclined orbit mode include a condition rendering the authorization subject to cancellation without a hearing should the Commission find it necessary to accommodate more efficient satellites or if, in the opinion of the Commission, circumstances should so require.[10] By virtue of this authorization, GTE Spacenet is not awarded preferential rights to 93^0 W.L. and remains subject to all operational conditions specified in the temporary authorization order.[11]

7. Accordingly, IT IS ORDERED that, pursuant to Section 0.291 of the Commission's rules on delegations of authority, GTE Spacenet's request for modification IS GRANTED subject to the following conditions:

(a) GSTAR III must cease operations at 93^0 W.L. not later than the date on which that location is to be occupied by a satellite to which the location is regularly assigned;

(b) GSTAR III's attitude shall be corrected periodically to achieve a stationary spacecraft antenna pattern on the Earth's surface and centered on the satellite's designated service area;

(c) GTE Spacenet shall control all interference to adjacent satellites to levels not exceeding that which would be caused by the satellite network operating in a normal stationkeeping mode;

(d) GTE Spacenet can not claim interference protection in excess of that which would be received by the satellite network operating in a normal stationkeeping mode;

(e) GTE Spacenet shall continue to maintain GSTAR III at the authorized longitude orbit location with the appropriate east-west stationkeeping tolerance;

(f) Interference in excess of that described in (d) above shall not be caused to any other lawfully operated radio station, and any such interfering operations shall cease immediately upon notification;

(g) This temporary authorization is subject to change in any of its terms or to cancellation in its entirety at any time upon reasonable notice, but without hearing, if in the opinion of the Commission circumstances should require;

(h) This temporary authorization is subject to cancellation or modification should the Commission decide it necessary to make adjustments in any orbital assignments;

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

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[8] *See* letter from Chairman, IFRB to Richard C. Beaird, Department of State (March 11, 1991). The IFRB considered the need for a regulatory limitation of the inclination excursion of a geostationary satellite and concluded that the use of slightly inclined geosynchronous satellite orbits shows relatively few problems in the specific area of concern for the application of the RR1060 coordination procedure of geostationary satellites.

[9] *See* Comsat General Corporation, 4 FCC Rcd 3820 (Com. Car. Bur. 1989), at para. 8.

[10] *See*, e.g., letters from Chief, Domestic Facilities Division, to H. Richard Juhnke (February 26, 1988) (Extension of operating authority and authority to use the Comsat maneuver for Westar 3) and Robert Mansbach (July 26, 1988, February 29, 1988 and September 1, 1987) (Comsat maneuver for SBS-2, Comsat D-2/D-4 and SBS-1, respectively). *See also* 5 FCC Rcd 1182 (Com. Car. Bur. 1990), *supra*, note 5.

[11] GTE Spacenet Corporation, 5 FCC Rcd 1182 (Com. Car. Bur.1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE & TELEGRAPH CO. — File No. I-T-C-93-058

Application for authority to make available and operate facilities for service to Trinidad and Tobago

ORDER AND AUTHORIZATION

Adopted: April 27, 1993; **Released: May 6, 1993**

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, we find that authorization of the requested facilities and services is required by the public convenience and necessity.

2. Accordingly, IT IS ORDERED that Application File No. I-T-C-93-058 IS GRANTED, and AT&T is authorized to:

a. make available to its correspondent, Telecommunications Services of Trinidad and Tobago (TSTT), in Trinidad and Tobago, on an Indefeasible Right of User basis, a one-half interest in 30 MAUOs,[1] wholly-owned by AT&T, in Segment F (Florida-Puerto Rico) of the Transcaribbean Cable system (TCS-1); and

b. use its one-half interest in the above facilities, in conjunction with previously authorized facilities in the TAINO-CARIB cable system and the Digital Eastern Caribbean Microwave System and the matching capacity furnished by TSTT, to provide AT&T's regularly authorized services between the U.S. and Trinidad and Tobago.

3. IT IS FURTHER ORDERED that AT&T shall file copies of any operating agreements, including the applicable accounting rate, entered into with its correspondents within 30 days of their execution, and shall otherwise comply with the filing requirements contained in §43.51 of the Commission's Rules, 47 C.F.R. §43.51.

4. IT IS FURTHER ORDERED that our authorization of AT&T to provide private lines is limited to the provision of such private lines only between the United States and Trinidad or Tobago -- that is, private lines which originate in the United States and terminate in either Trinidad or Tobago or which originate in either Trinidad or Tobago and terminate in the United States. In addition, AT&T may not -- and AT&T's tariff must state that AT&T's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or the Trinidad or Tobago end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that the Trinidad or Tobago affords resale opportunites equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), *Order and Reconsideration and Third Further Notice of Proposed Rulemaking*, 7 FCC Rcd 7927 (1992), *petitions for reconsideration pending*.

5. IT IS FURTHER ORDERED that neither AT&T nor any persons or companies directly or indirectly controlling or controlled by AT&T, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which AT&T or any persons or companies controlling or controlled by AT&T are parties.

6. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

[1] A MAUO is one 64 kbps equivalent voice channel.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GULFLINK COMMUNICATIONS, INC. File No. I-T-C-93-063

Application for Authority Pursuant to Section 214 of the Communications Act of 1934, to Establish Channels of Communication between the U.S. and INTELSAT Atlantic and Pacific Satellites for the Provision of INTELSAT Business Service and International Television Service

ORDER AND AUTHORIZATION

Adopted: April 27, 1993; Released: May 6, 1993

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the present and future public convenience and necessity require the provision of INTELSAT Busines Services (IBS) and International Television Service by Gulflink Communications, Inc. (Gulflink).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-93-063 IS GRANTED, and Gulflink is authorized to establish channels of communications between appropriately licensed earth stations in the U.S. and INTELSAT Atlantic Ocean Region (AOR) and Pacific Ocean Region (POR) satellites for the provision of IBS and International Television Service between the U.S. and countries listed in Comsat's Tariff F.C.C. No. 103 for the space segment of IBS and International Television Service.

3. IT IS FURTHER ORDERED that the authority granted herein for Gulflink to establish channels of communication between the earth stations in the U.S. and the INTELSAT satellites does not dispense with the requirement that all such earth stations shall be authorized under Title III of the Communications Act of 1934, as amended, to communicate with those satellites.

4. This authorization is not to be construed as permitting the provision of any services between earth stations located within the U:S.

5. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between Gulflink and its correspondents, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

6. IT IS FURTHER ORDERED that our authorization of Gulflink to provide private lines is limited to the provision of such private lines only between the United States and those countries listed in Comsat's IBS tariff -- that is, private lines which originate in the United States and terminate in one of those countries listed in Comsat's IBS tariff or which originate in one of those countries listed in Comsat's IBS tariff and terminate in the United States. In addition, Gulflink may not -- and Gulflink's tariff must state that Gulflink's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international switched services, unless authorized to do so by the Commission upon a finding that the foreign administration affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), and *Order on Reconsideration and Third Further Notice of Proposed Rulemaking*, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending.*

7. IT IS FURTHER ORDERED that neither Gulflink nor any persons or companies directly or indirectly controlling or controlled by Gulflink, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which Gulflink or any persons or companies controlling or controlled by Gulflink are parties.

8. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

9. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

10. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. §63.10(b).

11. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GTE HAWAIIAN TELEPHONE CO., INC. File No. I-T-C-93-064

Application for authority to provide International Message Telecommunication Service (IMTS) via Single Channel per Carrier (SCPC) facilities, to provide earth station services for IBS use to designated locations and to transfer SCPC circuits to Ewa Earth Station.

ORDER AND AUTHORIZATION

Adopted: April 27, 1993; **Released: May 6, 1993**

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-93-064 IS GRANTED, and GTE Hawaiian Telephone Co., Inc. (HTC) is authorized to:

a. provide IMTS from the Ewa, Oahu, Hawaii earth station via SCPC baseband facilities, and to transfer existing SCPC circuits from GTE Spacenet's Sunset Beach earth station to the Ewa earth station,[1] as listed in the attached Appendix; and

b. provide earth station services at the Ewa earth station for carriers desiring to use Comsat's IBS services to Japan and Korea.

3. IT IS FURTHER ORDERED that HTC shall modify at least one of its earth stations (call sign KA278 or KA279) at Ewa, Hawaii to add SCPC service for IMTS before transferring the circuits authorized herein.

4. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

5. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of the public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

APPENDIX

SCPC Circuits to be transferred from Sunset Beach Earth Station to Ewa Earth Station

Country	Circuits
American Samoa	2
Federated States of Micronesia	6
Fiji	2
French Polynesia	8
India (via Malaysia)	1
Marshall Islands	7
New Zealand	4
Palau	7
Papua New Guinea	2
Saipan	1
Taiwan	5
Tonga	10
Western Samoa	2
Total	**57**

[1] All other terms and conditions of the Commission's Orders remain the same. *See* File Nos. I-T-C-90-037, 5 FCC Rcd 2047 (1990), I-T-C-90-166, 5 FCC Rcd 7456 (1990), and I-T-C-93-007, 8 FCC Rcd 1217 (1993).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CICI, Inc. File No. I-T-C-93-072

For Authority Pursuant to
Section 214 of the
Communications Act of 1934, as
Amended, to Acquire And Operate
Capacity in the DK-GER 1 And
DK-RUSS 1 Cable Systems, for the
Rendition of Its Authorized
Services to Russia.

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: April 27, 1993; Released: May 6, 1993

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed by CICI, Inc. (CICI)[1] pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS ORDERED that application File No. I-T-C-93-072 IS GRANTED and CICI is authorized to:

a. acquire, on an Indefeasible Right of User (IRU) basis, a one-half interest in two (2) jointly assigned Minimum Investment Units (MIUs)[2] (60 64-kbps half channels) in the DK-GER 1 Cable System;[3]

b. acquire, on an ownership basis, a one-half interest in two (2) jointly assigned MIUs in the DK-RUSS 1 Cable System;[4]

c. lease appropriate extension facilities;[5] and

d. use the facilities defined in a., b. and c. above to extend CICI's circuit capacity in the TAT-10 Cable System for the provision of its authorized services between the United States and Russia.[6]

2. IT IS FURTHER ORDERED that neither CICI nor any persons or companies directly or indirectly controlling it or controlled by it, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which CICI or any person or companies controlling or controlled by CICI are parties.

3. IT IS FURTHER ORDERED that CICI shall file copies of any operating agreements, including the applicable accounting rate, entered into with its correspondents within 30 days of their execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

4. IT IS FURTHER ORDERED that our authorization of CICI to provide private lines is limited to the provision of such private lines only between the United States and Russia -- that is, private lines which originate in the United States and terminate in Russia or originate in Russia and terminate in the United States. In addition, CICI may not -- and CICI's tariffs must state that CICI's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or the Russia end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that Russian affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), *Order on Reconsideration and Third Further Notice of Proposed Rulemaking*, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending.*

5. IT IS FURTHER ORDERED that CICI shall file quarterly reports of revenue, number of messages, and number of minutes of both originating and terminating traffic for all international services between the U.S. and Russia within 90 days from the end of each calendar quarter.

6. IT IS FURTHER ORDERED that CICI shall file tariff provisions pursuant to Section 203 of the Communications Act of 1934, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized herein.

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[1] We note that CICI previously has been found to be a dominant carrier in its provision of international common carrier services between the U.S. and international points and remains subject to dominant carrier regulation until it is reclassified pursuant to a Commission decision.

[2] A MIU is defined as thirty (30) 64-kbps channels.

[3] CICI's proposes to acquire its IRU interest in the 2 one-half MIUs in the DK-GER 1 from the Deutsche Bundespost Telekom at a total cost of $27,000.00.

[4] CICI proposes to acquire its ownership interest in the DK-RUSS 1 Cable System from TELECOM Denmark at a total cost of $141,000.

[5] CICI will also make the appropriate arrangements to connect the DK-GER 1 and DK-RUSS 1 Cable Systems in Denmark by entering into a 15-year DDP transit arrangement with TELECOM Denmark for one-half interest in 2 MIUs (2 E1s) at a total cost of approximately 180,000 G.F.

[6] We note that should CICI obtain any interest in facilities beyond Russia for the purpose of providing common carrier services, including private line service, between the United States and other foreign points, such action would constitute an extension of line under Section 214 of the Communications Act. Therefore, under the provisions of the Commission's *International Competitive Carrier Decision*, 102 FCC 2d 812 (1985), *recon. denied* 60 R.R. 2d 1435 (1986), it would be necessary for CICI to file additional applications for a certificate of public convenience and necessity under Section 214 to begin service to each additional country and for authority to acquire any facilities needed to provide service to such additional points.

7. IT IS FURTHER ORDERED that CICI shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Communications Act, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that CICI, as a dominant carrier, shall request Section 214 authorization for all circuit additions to Russia, pursuant to Section 63.01 of the Commission's Rules, 47 C.F.R. §63.01.

9. This order is issued pursuant to Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-128

In re Applications of

TOCCOA FALLS COLLEGE
Belton, South Carolina
(Hereafter "Toccoa Falls")
File No. BPED-920113ML

Req: 88.5 MHz; Channel 203C2
50 kW; 91 Meters (H&V)

NAZARETH COMMUNICATIONS, INC.
Williamston, South Carolina
(Hereafter "Nazareth")
File No. BPED-920811MA

Req: 88.3 MHz; Channel 203C2
50 kW; 91 Meters (H&V)

For a Construction Permit
For a Non-commercial Educational
FM Station

HEARING DESIGNATION ORDER

Adopted: April 22, 1993; Released: May 6, 1993

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new, non-commercial, educational FM station.

2. *Toccoa Falls.* Toccoa Falls' application is incomplete in that it fails to contain page 3 of FCC Form 340 (Item 8, Section II, page 2). Item 8 directs the applicant to list all the parties to the application. To remedy this deficiency, Toccoa Falls will be required to provide the information requested on page 3 of FCC Form 340 (Item 8, Section II.) with the presiding Administrative Law Judge within 30 days of the release of this Order.

3. *Nazareth.* Section 73.503(a) of the Commission's rules states that:

> A noncommercial educational FM broadcast station will be licensed only to a nonprofit educational organization and upon showing that the station will be used for the advancement of an educational program.

Furthermore, following Commission action in *Moody Bible Institute*, 66 FCC 2d 162 (1977), the staff formulated processing standards for use in analyzing applicants for the educationally reserved FM frequencies. These processing standards were later published as Appendix A to the *Notice of Inquiry* in Docket 78-164, 43 Fed. Reg. 30842 (1978). The standards state that an applicant for a noncommercial, educational FM license may qualify as either an educational institution or as an educational organization -- the standards for qualification as an organization requiring additional information from the applicant. Organizational applicants must demonstrate that they have an educational goal and are committed to the advancement of an educational program. In evaluating compliance with these standards, emphasis is given to programs proposed that are either instructional (for credit) or general educational in nature (no formal credit).

4. Nazareth has indicated, in response to Item 1C, Section II of FCC Form 340, that it is a "nonprofit educational organization". As such, Item 2, Section II, FCC Form 340 requires that the applicant describe in an exhibit its nature and purpose. Nazareth has stated (in Exhibit II-I, as amended) that:

> Nazareth plans to work closely with Presbyterian College in Clinton, South Carolina, the proposed Greenville Christian School of the Arts (GCSA), as well as other local educational institutions, in producing and airing programs which have cultural and educational content. As set forth below in greater detail, certain programs to be aired on the proposed station will offer the opportunity for students at the Presbyterian College and the new Greenville Christian School of the Arts to obtain academic credit, and will serve to complement on-campus and in-school instructional courses and educational activities. As part of their class work Presbyterian College and GCSA students will work at Nazareth's facility in a number of technical and programming capacities.

5. Since Nazareth has applied as an educational organization, its application must meet the processing standards for this type of applicant. While Nazareth has indicated that it will have cultural and educational programming, developed in conjunction with educational institutions, we find the material submitted by Nazareth insufficient to make a determination that it is a qualified educational organization with a specific educational goal, *independent* of the institutions it references, and that it is committed to the advancement of an educational program in accordance with 47 C.F.R. § 73.503(a). Accordingly, an appropriate issue will be specified.

6. Nazareth's established "B" cut-off date for filing amendments of right was December 30, 1992. On that date Nazareth proffered an amendment which contained an updated list of the principals of the applicant, Item 8, Section II of FCC Form 340, as well as revisions to its exhibits detailing the educational purpose of the applicant, advancement of an educational program, and statement of proposed programming. However, this amendment was unaccompanied by an original signature of the applicant. The cover page with the original signature was received by the Commission on December 31, 1992. We shall accept the amendment for good cause, since it relates to Nazareth's basic qualifications. *See Azalea Corp.*, 31 FCC 2d 561 (1971). However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

7. *Other Matters.* The applicants have not indicated whether an attempt has been made to negotiate a share-time arrangement. Therefore, an issue will be specified to determine whether a share-time arrangement between the applicants would be the most effective use of the frequency and thus better serve the public interest. *Granfallon Denver Educational Broadcasting, Inc.*, 43 Fed. Reg. 49560 (October 24, 1978). It should be noted that our action specifying a share-time issue is not intended to preclude the applicants, either before the commencement of the hearing or at any time during the course of the hearing, from participating in negotiations with a view toward establishing a share-time agreement themselves.

8. The respective proposals are for different communities. Consequently, it will be necessary to determine pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

9. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

10. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Nazareth is a qualified educational organization as required by 47 C.F.R. § 73.503(a).

2. To determine: (a) the number of other reserved channel noncommercial educational FM services available in the proposed service area of each applicant, and the area and population served thereby; (b) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest and, if so, the terms and conditions thereof; and (c) in light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if either.

11. IT IS FURTHER ORDERED, That Toccoa Falls file, with the presiding Administrative Law Judge within 30 days of the release of this Order, an amendment which contains the information relative to its principals as set forth in paragraph 2 hereinabove.

12. IT IS FURTHER ORDERED, That the petition for leave to amend filed by Nazareth IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

13. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington D.C. 20554.

14. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

15. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay,
Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ALLNET COMMUNICATION SERVICES, INC.,
Complainant,

v.

NEW YORK TELEPHONE COMPANY, and — File No. E-90-183
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY, — File No. E-90-184
Defendants,

and

In the Matter of

TELESPHERE NETWORK, INC.,
Complainant,

v.

SOUTH CENTRAL BELL TELEPHONE COMPANY, — File No. E-90-176
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, — File No. E-90-177
NEW YORK TELEPHONE COMPANY, and — File No. E-90-358
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY, — File No. E-90-359
Defendants.

MEMORANDUM OPINION AND ORDER

Adopted: March 24, 1993; **Released: May 6, 1993**

By the Commission:

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I. INTRODUCTION

1. We have before us complaints filed by Allnet Communication Services, Inc. (Allnet) against New York Telephone Company (NYT) and New England Telephone and Telegraph Company (NET),[1] alleging that the defendants violated Section 201(b) of the Communications Act (the Act)[2] by earning in excess of the rate of return prescribed by the Commission for the period January 1, 1987 through December 31, 1988. Allnet further alleges that the defendants' rates for the 1987-1988 period were unlawful because they included disallowed expenses related to excess deferred taxes, unlawful affiliate transactions and certain lobbying and litigation activities. We also have before us complaints filed by Telesphere Network, Inc. (Telesphere)[3] against NYT and NET, South Central Bell Telephone Company and Southern Bell Telephone and Telegraph Company (together the "BellSouth Companies") similarly alleging violations of the Commission's rate of return prescription for the 1987-1988 monitoring period. Telesphere also alleges that defendants NYT and NET engaged in unlawful affiliate transactions during the 1987-1988 period.

[1] NET and NYT are sometimes referred to together in this Memorandum Opinion and Order as the "NYNEX Companies" or the "NTCs."

[2] 47 U.S.C. § 201(b).

[3] Telesphere is currently a debtor in bankruptcy before the United States Bankruptcy Court for the Northern District of Illinois.

Allnet and Telesphere seek monetary damages, plus accumulated interest, allegedly suffered as a consequence of the defendants' actions.

II. RATE OF RETURN ISSUES

A. Liability for Damages

2. For the reasons discussed below, we find that Allnet and Telesphere have met their burden of establishing that the defendant local exchange carriers (LECs) have violated Section 201(b) of the Act by earning in excess of the rate of return for interstate access services prescribed by the Commission for the period January 1, 1987 through December 31, 1988. In addition, we award complainant Allnet damages and interest for defendant NET's violations of our rate of return prescription in the amounts specified below. We also find, however, that Allnet has failed to sustain a damages claim against NYT and that Telesphere has failed to sustain damages claims against either the NTCs or the BellSouth Companies.

1. Background

3. The cases presented by the complainants are virtually identical to that presented by the complainant in *MCI Telecommunication Corporation v. Pacific Northwest Bell Telephone Co.*[4] In that proceeding, we held that LEC rates that produced earnings in excess of a Commission prescription were unjust and unreasonable within the meaning of Section 201(b) of the Act.[5] We also held that a complainant/customer is entitled to recover damages to the extent that it can show that it suffered actual damage as a consequence of such violations. Subsequently, in the damages phase of the proceeding, we held that MCI had properly shown that it had been harmed by paying the defendants' rates that produced the excessive earnings. We awarded the complainant monetary damages, plus interest computed at the IRS rate.[6]

4. A detailed accounting of the Commission's rate of return regulatory scheme as well as relevant Commission and court decisions is set forth in the *MCI Liability Order* and the *MCI Damages Order* [7] and will not be repeated at length here. However, a brief discussion of the development and implementation of the Commission's rate of return prescription is helpful to our analysis of the instant complaints.

5. Following the divestiture of the former Bell system and the concurrent development of the access charge system,[8] the Commission prescribed a rate of return system for all eight entities that emerged after divestiture (i.e., AT&T and the Seven Regional Bell Holding Companies) and approximately 1400 other local exchange carriers as well. In a broad rulemaking proceeding, the Commission adopted: (1) methodologies to be used to prescribe maximum rates of return; (2) procedures for represcribing rates of return on a regular basis; (3) a system of monitoring carriers' earnings; and (4) a requirement that overearnings be refunded, either directly to those who had paid rates that produced the overearnings, or pursuant to automatic, prospective adjustments to tariff rates.[9] For the two-year time period at issue in the instant complaints, January 1, 1987 through December 31, 1988, local exchange carriers, including the defendants, were required to file rates calculated to earn a 12 percent rate of return for overall interstate access.[10] In accordance with the Commission's "buffer" policy, carriers were given notice that 12.25 percent would be the maximum allowable rate of return on overall interstate earnings and that 12.40 percent would be

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[4] MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co., 5 FCC Rcd 216 (1990) (*MCI Liability Order), recon. denied,* 5 FCC Rcd 3463 (1990) (*MCI Reconsideration Order)* (jointly "MCI Orders"), *appeal dismissed sub nom. Mountain States Tel. and Tel. Co., et al. v. FCC,* 951 F.2d 1259 (10th Cir. 1991) (per curiam). *See also,* American Telephone and Telegraph Co. v. Northwestern Bell Telephone Co., 5 FCC Rcd 143 (1990), *appeal dismissed sub nom. Mountain States Tel. and Tel. Co., et al. v. FCC,* 951 F.2d 1259 (10th Cir. 1991) (per curiam).

[5] 47 U.S.C. § 201(b). Section 201(b) provides that "[a]ll charges, practices, classifications, and regulations for and in connection with ... communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful."

[6] MCI Telecommunications Corporation v. Pacific Bell Telephone Company, *et al.,* FCC 93-70 (released Feb. 8, 1993) (*MCI Damages Order).*

[7] *MCI Liability Order,* 5 FCC Rcd at 217-18; *MCI Damages Order* at 2-3.

[8] The Commission has prescribed for all local exchange carriers, including the defendants, a methodology known as the "access charge system," which carriers are required to follow in tariffing their interstate access services. The system determines, *inter alia,* the carriers' overall rate structure and the allocation of costs within that structure, and was in effect during the period covered by the complaints. The access charge system is codified in Part 69 of the Commission's rules. *See* 47 C.F.R. § 69.1 *et seq.* (1988). These rules were developed in a proceeding that was the subject of numerous challenges on appeal. With a few exceptions not relevant to the instant complaint proceedings, these appeals were denied by the D.C. Circuit. *See NARUC v. FCC,* 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied,* 469 U.S. 1227 (1985).

[9] *See* Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Carriers, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985), (Phase I Order), *on reconsideration,* Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,103 (Apr. 1, 1986) (Phase I Reconsideration); *on further reconsideration,* 2 FCC Rcd 190 (1987) (*CC Docket 84-800). See also* Procedures and Methodologies to Establish Reporting Requirements, CC Docket No. 86-127, FCC 86-514 (released Dec. 3, 1986), 52 Fed. Reg. 273 (Jan. 5, 1987).

[10] *See* Authorized Rate of Return for the Interstate Access Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase III, FCC 86-354, 51 Fed. Reg. 32,920 (Sept. 17, 1986) (*Phase III Order), recon. denied,* 2 FCC Rcd 5636 (1987). *See also,* Procedures and Methodologies to Establish Reporting Requirements, CC Docket No. 86-127, FCC

the maximum allowable rate of return for any access service category.[11] The buffer[12] would be used to determine whether the prescription had been violated.[13]

6. In January 1988, the U.S. Court of Appeals for the District of Columbia Circuit set aside the automatic refund mechanism as arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce".[14] The Court acknowledged, however, that "the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate of return prescription."[15]

7. In February 1988, MCI filed formal complaints against a number of local exchange carriers, including several of the defendants in the instant proceeding, alleging violations of the Commission's rate of return prescription for the October 1, 1985 through December 31, 1986 monitoring period and requesting monetary damages.[16] In January 1990, the Commission released the *MCI Liability Order* granting MCI's complaints and directing MCI to file supplemental complaints for damages. In January 1991, however, the Commission placed all pending rate of return complaints, including MCI's supplemental complaints for damages, in abeyance pending resolution of a related court remand in *Illinois Bell Tel. Co. v. FCC*.[17] Following the return of the proceedings to active status[18] and the completion of discovery,[19] the parties to the various proceedings were required to submit initial briefs and reply briefs setting forth their respective claims and arguments.[20]

2. Contentions of the Parties

8. Complainants allege that the rates they paid for certain of the defendants' interstate access services during the period from January 1, 1987 through December 31, 1988 were unjust and unreasonable in violation of Section 201(b) of the Act. They support their allegations with evidence taken from reports filed with the Commission by the defendants for the two-year period at issue that show that defendants achieved earnings in excess of the Commission's prescribed rate of return on one or more of the three interstate access categories established for the purpose of enforcing that rate of return prescription.[21]

9. Complainants request that the Commission declare that the defendants' charges for the period from January 1, 1987 through December 31, 1988 are in violation of the rate of return prescription and Section 201(b) of the Act, and order the defendants to pay damages to them equal to the difference between the amount actually paid by complainants for interstate access service during the period and the amount that complainants would have paid if the defendants' charges earned no more than the maximum allowable rate of return, plus interest and attorney's fees.

10. The defendants advance a number of arguments to support their claim that complainants have failed to state causes of action under the Act, most of which were fully considered and disposed of in the *MCI Liability Order*.[22] The defendants make the threshold claim that earning in excess of a rate of return prescription is not a violation of the Act or any valid Commission rule or order; and, even

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86-514 (released Dec. 3, 1986), 52 Fed. Reg. 273 (Jan. 5, 1987).

[11] 47 C.F.R. § 65.700.

[12] *See MCI Liability Order*, 5 FCC Rcd at 217:

> ... the Commission established both an authorized rate of return and a 'spread' or 'buffer' above that return for use in proceedings relating to the enforcement of the prescription. In other words, the authorized return would be employed in computing tariff rates; the spread, or buffer, would be used in combination with the authorized return 'to determine whether a rate of return prescription had been violated.' [footnote omitted.]

[13] *See Phase I Order*, 50 Fed. Reg. at 41,352 (para. 21).

[14] American Telephone & Telegraph Co. v. FCC, 836 F.2d 1386, 1390 (D.C. Cir. 1988) (*AT&T v. FCC*). For a detailed discussion of *AT&T v. FCC*, see *MCI Liability Order*, 5 FCC Rcd at 221-23.

[15] *AT&T v. FCC*, 836 F.2d at 1392.

[16] During this same time period, numerous similar complaints were filed by other interstate access customers alleging violations of the Commission's rate of return prescription for the same time period.

[17] 911 F.2d 776 (D.C. Cir. 1990). Allnet's complaints and Telesphere's complaints were also held in abeyance. Allnet Communication Services, Inc. v. The Diamond State Telephone Company, *et al.*, 6 FCC Rcd 645 (Com. Car. Bur. 1991); Telesphere Network, Inc. v. New York Telephone Co. and New England Telephone and Telegraph Co., 6 FCC Rcd 703 (Com. Car. Bur. 1991) (*Abeyance Orders*). Allnet and Telesphere filed applications for review (Applications) of the *Abeyance Orders* on March 7, 1991. The Commission acted on the remand in October 1991. *See* Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, Decision on Remand, 7 FCC Rcd 296 (1991), *appeal docketed sub nom. Illinois Bell Tel. Co., et al. v. FCC*, No. 90-1020 (D.C. Cir. Jan.11, 1991). On December 23, 1991, the Enforcement Division of the Common Carrier Bureau (Division) released an order that reactivated the Telesphere cases. Order, 6 FCC Rcd 7535 (Com. Car. Bur. 1991). Then on March 12, 1992, the Division released an order that reactivated the Allnet cases. Order, 7 FCC Rcd 1891 (Com. Car. Bur. 1992). Those actions makes the Applications moot and, accordingly, we dismiss the Applications.

[18] *See* Allnet v. New York Telephone Company and New England Telephone and Telegraph Company, 7 FCC Rcd 4911 (Com. Car. Bur. 1992) (*Allnet Discovery Order);* and Telesphere v. New York Telephone Company and New England Telephone and Telegraph Company, 7 FCC Rcd 4891 (Com. Car. Bur. 1992) (*Telesphere Discovery Order)* (collectively "*Discovery Orders*").

[19] The parties in both proceedings served interrogatories on each other. On August 13, 1992, defendants filed a Motion to Serve Request for Production of Documents (accompanied by Request for Production of Documents) on Allnet. We dismiss the Motion as moot. On September 11, 1992, defendants filed a Motion to Compel Response to Interrogatories on Allnet. The Motion to Compel is moot and is dismissed accordingly.

[20] In the instant proceedings, the complainants and defendants all filed initial briefs (Br.) pursuant to the schedules established by the Bureau between September and October, 1992. Allnet and the NTCs also filed reply briefs (RBr.). However, for reasons neither stated by the parties nor apparent from the record, neither Telesphere nor the BellSouth Companies filed a reply brief in these proceedings.

[21] The interstate access service categories are special access, common line, and switched traffic sensitive. *See* 47 C.F.R. § 65.702 (1990). Complainants state that the monitoring reports recite that for the period January 1, 1987 through December 31, 1988: NYT earned a return of 13.24% in the switched access service category; NET earned a return of 12.72% in the switched access service category; and the BellSouth Companies earned a return of 15.21 % in the switched traffic sensitive category on a region-wide basis.

[22] The arguments made by the defendants are, for the most part, identical in their essentials. For convenience, we refer to

if such action could be considered a violation, it could occur only if the return was exceeded on an overall basis.[23] As primary support for this claim, the defendants cite to the D.C. Circuit's decision in *AT&T v. FCC,* and a later decision by the Sixth Circuit in *Ohio Bell Tel. Co. v. FCC.*[24] According to the defendants, it is contrary to *AT&T v. FCC* and *Ohio Bell* to find a rate of return violation when overall earnings for interstate access service did not exceed 12.25 percent regardless of whether individual access category earnings exceeded the prescribed 12.40 percent rate of return.[25] The defendants argue that consistent with *AT&T v. FCC,* the Commission must consider underearnings in determining whether particular overearnings are in violation of the Act.[26]

11. Finally, the defendants argue that a portion of the complainants' claims are barred by Section 415 of the Act,[27] which establishes a two-year statute of limitations on the filing of complaints for damages. According to defendants, Section 415 bars the recovery of any damages if sought more than two years after the occurrence of alleged overearnings.[28]

3. Discussion

12. We have carefully examined the record before us and conclude that the defendants have cited no facts and have made no arguments here that would warrant a ruling contrary to the *MCI Orders.*

13. *Failure to State a Cause of Action:* In the *MCI Liability Order,* we rejected identical claims made by the defendants in that proceeding and held that *AT&T v. FCC* establishes no precedent that bars an individual complainant from seeking a remedy under Section 208 of the Act for damages based on a carrier's reported overearnings.[29] We stated that

> we are not persuaded by defendants' claims that earning in excess of a prescribed rate of return does not violate that Act or, if it does, that the Commission *is required* to take a carrier's underearnings as well as its overearnings into account in determining whether a violation has occurred.
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> * * * * * * *
>
> We find that a valid prescription bound the defendants to a maximum earnings limitation, and the defendants admit that they earned in excess of that amount during the period in question.[30]

We found further that *AT&T v. FCC* did not pertain to Section 208 complaint proceedings. The Commission has the authority to order a carrier to pay damages if a complainant meets the burden of establishing both a violation of the Act and the actual injury.[31]

14. *AT&T v. FCC and Ohio Bell:* We disagree with the defendants' claim that *AT&T v. FCC* and *Ohio Bell* compel us to dismiss the instant complaints. As we emphasized in the *MCI Liability Order,* automatic refunds and refunds ordered under Section 204 of the Act are different from individual actions for damages under Section 208. Unlike the automatic refund mechanism in *AT&T v. FCC* or the refund procedure in *Ohio Bell,* both of which resulted from rulemaking proceedings initiated at the Commission's discretion, individual actions for damages under Section 208 of the Act are initiated by private parties seeking damages for injuries to themselves; those private parties have the burden of establishing both a violation of the Act and actual injury.[32] The courts in *AT&T v. FCC* and *Ohio Bell* did not discuss private complaints for damages; they did not invalidate private actions for damages; and their

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the defendants' arguments as if they were part of the same pleading. To the extent that individual defendants make unique or separate arguments, we address them accordingly.

[23] *See, e.g.,* NTCs' Br. at 3-7.

[24] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC).* The court invalidated the Commission's procedure to enforce its rate of return prescriptions through automatic refunds of carrier overearnings to customers. For a detailed discussion of *AT&T v. FCC, see MCI Liability Order,* 5 FCC Rcd at 221-23. The Court of Appeals for the Sixth Circuit, relying on *AT&T v. FCC,* vacated a Commission order that dealt with refunds of earnings in excess of the authorized rate of return for the special access category over a period of years in the context of a strategic pricing investigation. *See Ohio Bell v. FCC,* 949 F.2d 864 (6th Cir. 1991). The court primarily relied upon the statement from *AT&T v. FCC* that a rate of return prescription is both a minimum and a maximum prescription. *See AT&T v. FCC,* 836 F.2d at 1390. The Commission has clarified, however, that it does not view a rate of return prescription as both a maximum and a minimum and has stated that

> [o]ur accumulated experience with rate of return prescriptions, and our review of the cost of capital evidence in this proceeding, convince us that there is no such point. * * * We believe there is a substantial gap between an earnings level that is fully adequate to assure attraction of capital on favorable terms, and an earnings level which, if sustained over time, would be confiscatory.

Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, 5 FCC Rcd 7507, 7532 (1990), *appeal docketed sub nom. Illinois Bell Telephone Co., et al. v. FCC,* No. 90-1020 (D.C. Cir. Jan.11, 1991).

[25] NTCs' Br. at 3-8.

[26] NTCs' Answer at para. 35.

[27] Section 415 provides, in pertinent part, that "[a]ll complaints against carriers for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after...." 47 U.S.C. § 415(b) (1982). The term "overcharges" is defined in Section 415 "to mean charges for services in excess of those applicable thereto under the schedules of charges lawfully on file with the Commission." 47 U.S.C. § 415(g) (1982).

[28] We note that in their answer to Telesphere's original complaints, the NTCs contended that the rates at issue were approved or prescribed by the Commission and cannot be subject to refunds or damages claims. The defendants do not, however, repeat this argument in their briefs or reply briefs in either the Allnet or Telesphere proceedings. In any event, the argument that the rates at issue were prescribed by the Commission was discussed at length and rejected in the *MCI Liability Order.* 5 FCC Rcd at 222-23, para. 55. The defendants have raised no new issues or set forth arguments that would persuade us to depart from our previous determination.

[29] *MCI Liability Order,* 5 FCC Rcd at 222-23.

[30] *MCI Liability Order,* 5 FCC Rcd at 223 [emphasis in the original].

[31] *Id.*

[32] *See MCI Liability Order,* 5 FCC Rcd at 222-23, para. 55.

holdings are not applicable to the different separately authorized complaint procedure set forth in Sections 206-209 of the Act. Accordingly, those decisions do not require us to depart from our holding in the *MCI Liability Order* that to the extent that a LEC charges rates that produce earnings in excess of a binding rate of return prescription, such rates are unjust and unreasonable under Section 201(b) of the Act and the carrier is liable for monetary damages to the extent a complainant customer can establish that it was harmed as a result of the violation.[33]

15. *Statute of Limitations:* We held in the *MCI Liability Order* that the date a carrier files its final rate of return monitoring report is dispositive with regard to the date a complainant discovers the right or wrong or the fact on which such knowledge is chargeable as a matter of law.[34] Defendants have made "no argument that persuades us to alter this determination. Accordingly, Section 415 does not bar complainants' complaints.

B. Damages, Interest, and Attorney's Fees Claims

1. Damages

a. Contentions of the Parties

16. The complainants' damages claims rest primarily on the contention that the proper measure of the damages they incurred as a result of defendants' violations is the difference between the amount they actually paid defendants for interstate access services during the January 1, 1987 through December 31, 1988 period and the amount they would have paid if the defendants' rates had produced earnings that did not exceed the Commission's prescribed rate of return. In the *Discovery Orders*, the Bureau stated that it tended to agree, in principle, that a possible measure of the damages stemming from defendants' rate of return violations could be the difference between the amount complainants actually paid the defendants for interstate access services during the January 1, 1987 through December 31, 1988 monitoring period and the amount they would have paid if the defendants' rates produced earnings that did not exceed the Commission's prescription.[35] The Bureau was not persuaded on the record before it, however, that a damages determination based solely on such a measure necessarily reflected actual damages incurred by the complainants.[36] The defendants were invited to submit evidence that could serve to mitigate or otherwise reduce complainants' damages claims. Specifically, the Bureau stated that evidence demonstrating that complainants' share of excessive earnings realized in a particular access category by a defendant could be offset or otherwise reduced due to facts and circumstances surrounding complainants' purchase of other interstate access services from such defendant for the relevant monitoring period might be relevant.[37]

17. In its opening brief, Allnet claimed that the sum of the damages due Allnet based on simple overearnings is $71,000 in the case of NYT and $90,000 in the case of NET.[38] Allnet then applied what it describes as a 15% "cost of money" interest factor[39] to these base amounts to derive a damages claim of $108,000 against NYT and $138,000 against NET, or a total of $246,000 for the two defendants. Allnet claims that factoring in the defendants' underearnings in the common line and special access categories for the relevant period,[40] its damages claims are reduced to a total of $107,000 for the two defendants.[41] In computing offsets, Allnet applied its share of defendants' underearnings to the full amounts of its damages claims (including interest) and not the base amounts of $71,000 for NYT and $90,000 for NET. In its reply brief, Allnet's recalculated its damage claims using what it refers to as "4% symmetric unreasonableness buffer above and below the prescribed

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[33] *Id.* at 226, para. 86.

[34] In the *MCI Liability Order* we stated:

> the defendants filed the rate of return monitoring reports which ... were developed by the Commission for several purposes, including making information about carrier earnings public[ly] available. Moreover, the monitoring reports relied on by MCI in its complaints were specifically designated by the Commission as a "final" and conclusively binding determination of a carrier's earnings.

5 FCC Rcd at 225.

[35] *See, e.g., Telesphere Discovery Order*, 7 FCC Rcd at 4892, para. 8.

[36] *Id.*

[37] *Id.*

[38] *See* Allnet Br. at 2-3, Attachment - 3a and A - 4a. To derive the stated amounts, Allnet first calculated for each access service category, the amounts the defendants' earnings exceeded the prescribed rate of return of 12.4%. Allnet computed its share of the defendants' revenues in each category by dividing the amount defendants billed Allnet by defendants' revenues for each category. Using the resulting figure, Allnet computed its share of defendants' overearnings by multiplying Allnet's share of defendants' revenues by the amount of overearnings for each category.

[39] Allnet maintains that its 15% cost of money interest factor is appropriate because it reflects Allnet's financial condition due to the failure of the defendants to correct their overcharges. According to Allnet, it operated unprofitably and was cash negative during the relevant period and had to borrow money to cover its ongoing cash requirements. Allnet Br. at 3, n.2.

[40] Allnet's computations reflect underearnings by NYT in the common line and special access categories attributable to Allnet purchases during the relevant period of $19,000 and $84,000 respectively. The computations further show underearnings by NET attributable to Allnet's purchase of special access services totaling $36,000.

[41] Allnet also sets forth higher damage claims based on what it describes as the defendants' unlawful affiliate transactions and wrongful inclusion of excess deferred taxes and lobbying and litigation expenses during the period in question. Allnet derives the higher damage claim by recalculating the defendants' earnings levels including the amounts which it claims were wrongfully included as expenses in the defendants' rate base determinations. In this damages section, we address only Allnet's claims for damages based defendants' earnings in excess of the prescribed rate of return as reflected in defendants' Form 492s for the 1987-1988 monitoring period. Allnet's claims regarding unlawful affiliate transactions and lobbying and litigation expenses are addressed in sections III. and IV., *infra*. With respect to excess deferred taxes, we note that Allnet's claims in this regard have previously been considered and rejected by the Commission and require no further discussion here. *See* Allnet Communication Services, Inc. v. NECA, *et al.*, 6 FCC Rcd 2608, *recon. denied*, 6 FCC Rcd 5663 (1991), *appeal docketed sub nom. Allnet Communication Services, Inc. v. FCC*, No. 91-1562 (D.C. Cir. Nov. 19, 1991).

rate of return."[42] In effect, Allnet reduced the defendants' minimum earnings level to 11.60% for purposes of computing underearnings to be subtracted from the its claimed damages amounts. Using a minimum earnings threshold of 11.60% for purposes of computing defendants' underearnings, Allnet revised its damages claims, including interest, to $67,000 in the case of NYT and $109,000 in the case of NET.

18. Telesphere does not state or otherwise identify the specific amount of damages it seeks from defendants. Instead, it represents without qualification or amplification that it is entitled to "the award in full" of damages in the amounts contained in the defendants' responses to interrogatories.[43] In their responses to Telesphere's interrogatories, however, the NTCs took the position that they were not required, and did not, in any event, have the information necessary to compute damages based on the measure advocated by Telesphere. For their part, the BellSouth Companies responded to Telesphere's interrogatories by providing information setting out the BellSouth Companies' earnings for each interstate access service category during the period in question, along with information showing their access billings to Telesphere during the period.[44] The BellSouth Companies did not, however, provide the computations showing the difference between the amounts they actually billed Telesphere and the amounts they would have billed if their rates had produced earnings at the prescribed rate of return. The defendants pointed instead to factors such as Telesphere's varying market share and its purchase of access services at discounted rates during the period in question as impacting any calculation of Telesphere's share of the BellSouth Companies' overearnings for the 1987-1988 period.[45] The record reflects that Telesphere did not move to compel defendants to provide more complete responses to the interrogatories or otherwise challenge the defendants' factual assertions.

19. The defendants challenge complainants' damages claims on a number of grounds, raising several arguments that were previously considered and rejected by the Commission in the *MCI Liability Order* and the *MCI Damages Order*. Defendants contend that by simply basing its damages claims on a calculation of complainants' prorated share of category-level overearnings, complainants ask the Commission to award them damages measured in the same way refunds would have been determined under the automatic refund rule invalidated by the court in *AT&T v. FCC*. The defendants maintain that such a result is expressly precluded by *AT&T v. FCC*. The defendants add that the decision in *Ohio Bell* makes it abundantly clear that an award of damages based solely on category level overearnings is precluded. According to the defendants, *Ohio Bell* reaffirms the proposition established in *AT&T v. FCC* that the Commission cannot have a rate of return refund structure which would operate to drive carriers' total interstate earnings below the prescribed level.[46] The defendants also argue that *Illinois Bell*[47] reemphasizes that refunds can only be awarded in cases where the rates in question have been suspended pursuant to Section 204 of the Act.[48]

20. Defendants next contend that, even if *AT&T v. FCC* and *Ohio Bell* do not preclude complainants' damages claims, the claims still fail because their complaints do not establish valid causes of action. According to defendants, to pursue a damages claim, complainants must first show that the defendants charged unjust and unreasonable rates for interstate access services during the period in question, not that defendants' rates produced excessive returns in individual service categories.[49] Defendants maintain that by simply referencing defendants' earned rates of return for individual access service categories, complainants have not only failed to allege any facts that would establish that defendants' rates were unjust and unreasonable during the period in question but have also failed to show that they sustained actual damage as a result of those rates.[50] According to the defendants, if their rates had been lower, Allnet would have been required to flow through those lower rates to their own customers and in response, complainants would have been forced to reduce their own prices.[51] The defendants claim, in effect, that complainants would receive a windfall if they passed the "overcharges" on to their customers and are now awarded damages.

21. The defendants further contend that the complainants' claims for damages are flawed because the complainants erroneously assume that lower rates would have produced lower earnings and offer no probative evidence to show what a reasonable rate would have been or to otherwise support their damages claims.[52] The BellSouth Companies make the specific claim that Telesphere, as a nondominant interexchange carrier, paid rates for switched access services that were discounted as much as 55% from a cost-based rate during the period in question.[53] Therefore, the BellSouth Companies contend, because Telesphere purchased services at discounted rates, it can not show damages even if the BellSouth Companies' earnings exceeded the Commission's prescribed rate of return.[54]

22. Allnet attempts to refute the NTCs' claims by arguing that the defendants fail to recognize the distinction between damages and refunds. Allnet states that it brought its action as a complaint for damages under §§ 206-209 of the Act, not as a request for refunds pursuant to other provisions of the Act.[55] Allnet also points out that defendants have been given the opportunity to show offsets which were not al-

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[42] *See* Allnet RBr. at 1, Attachments I and II.

[43] Telesphere Br. at 3.

[44] BellSouth Companies' Response to Interrogatories at 2-3, Attachments 1-4.

[45] *Id.* at 3-4.

[46] NTCs' Br. at 7; BellSouth Companies' Br. at 15.

[47] *Illinois Bell v. FCC*, 966 F.2d 1478 (D.C. Cir. 1992) (*Illinois Bell*).

[48] NTCs' Br. at 8; BellSouth Companies' Br. at 10.

[49] *See, e.g.*, NTCs' Br. at 12.

[50] *See, e.g.*, NTCs' Br. at 11-12. The NTCs contend that the principle that the complainants must still prove they were damaged and in what amounts was established by the Supreme Court in *Southern Ry. Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 455 (1979) (*Seaboard*), in construing relevant sections of the Interstate Commerce Act. The NTCs state that this ruling has been found applicable to proceedings under the Communications Act. *Id.*, citing *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 (1981); *Las Cruces TV Cable v. FCC* 645 F.2d 1041, 1047 (D.C. Cir. 1981). Here too, as we determined in the *MCI Damages Order*, the NTCs' reliance on case precedent is misplaced. *MCI Damages Order* at n.59.

[51] NTCs' Br. at 12.

[52] *See, e.g.*, NTCs' Br. at 11-12; BellSouth Companies' Br. at 17-19.

[53] BellSouth Companies Br. at 19.

[54] *Id.*

[55] Allnet RBr. at 2.

lowed in *AT&T v. FCC* and *Ohio Bell* proceedings. In addition, Allnet argues that its complaint only seeks refunds on overearnings on services it purchased. Allnet asserts that where a customer purchased more of the service that overearned than it did the service that underearned, then that customer has clearly been damaged without regard to the defendant carrier's level of underearnings. Allnet also disputes the NTCs' claim that a reduction of their rates would have necessarily resulted in a corresponding reduction in Allnet's rates as being irrelevant to the issues raised in this proceeding.[56] Allnet maintains that it has shown that defendants charged it rates that produced earnings in excess of the Commission's prescribed rate of return and argues that its damages are the excessive charges that Allnet paid.[57]

23. For its part, Telesphere does not dispute the offset amounts claimed by the NTCs; nor does it attempt to refute the NTCs' or the BellSouth Companies' claims that Telesphere suffered no actual damage in connection with its purchase of access services from the defendants.

b. Discussion

24. *AT&T v. FCC and Ohio Bell:* The defendants' claims that the holding in *AT&T v. FCC* and *Ohio Bell* control these proceedings and bar an award of damages to complainants are without merit for the reasons stated in both the *MCI Liability Order* and the *MCI Damages Order*. In the liability section above, we again emphasized that the court in *AT&T v. FCC* explicitly acknowledged the Commission's authority to order a carrier to disgorge earnings in excess of a rate of return prescription,[58] finding only the remedy component of the Commission's rate of return prescription (the automatic refund mechanism) to be unlawful.[59] More to the point, we emphasized that "the [*AT&T v. FCC*] opinion does not address Section 208 complaint proceedings nor purport to alter the statutory scheme of the Act or the remedies Congress established therein."[60] Similarly, as we stated in the *MCI Damages Order*, the *Ohio Bell* decision does not expand upon *AT&T v. FCC* and does not address the Commission's authority to award damages in private complaint actions under Section 208 of the Act.[61]

25. *Section 201(b) of the Act:* We turn now to the defendants' contention that complainants' damages claims must be dismissed because they have failed to prove defendants' rates were unjust and unreasonable within the meaning of Section 201(b) of the Act. In the liability section above, we held that the complainants met their burden of proof by establishing that the defendants violated our rate of return prescription.[62] Accordingly, the question before us now is not whether defendants' rates were unjust and unreasonable; rather the question now is whether the complainants suffered any measurable damage as a consequence of paying rates previously determined by the Commission to be unlawful under Section 201(b).

26. *Illinois Bell:* We also reject defendants' claim that the decision in *Illinois Bell* somehow leaves the Commission only with Section 205 authority in the face of a violation of our rate of return prescription. In *Illinois Bell*, the court found that the Commission had ordered a refund under Section 204(a) of the Act without having issued a suspension order. The sole issue presented for resolution by the court was the difference in interpretation by the Commission and the petitioning parties of the Commission's authority under Section 204.[63] The court did not address individual complaint remedies, but merely held that the Commission is not authorized to order refunds under Section 204 without having issued a suspension order, and that in doing so it must have acted under Section 205, which provides for prospective relief only.[64]

27. *Damages and Offsets:* The defendants' arguments are devoted primarily to attempting to persuade the Commission that the complainants' damages claims are really claims for restitution or refunds governed by equitable or public policy considerations. The defendants argue, in effect, that the damages complainants seek are equivalent to refunds that would have been required under the refund mechanism invalidated by the court in *AT&T v. FCC*. We do not agree. We are concerned here with determining whether a particular customer, which has availed itself of a statutory complaint remedy under Title II of the Act, has sustained any measurable damage that can be traced to defendants' violations of the Act. Although a damages award under Section 208 of the Act might well be equal or substantially similar to a refund ordered under Section 204 of the Act,[65] this does not transform a private complaint action into a public enforcement proceeding subject to broad public interest considerations.

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[56] *Id.* at 6.

[57] *Id.* at 7, citing *Southern Pacific Co. v. Darnell-Taenzer Co.*, 245 U.S. 531, 533-34 (1918) where the court stated that the carrier should not be allowed to keep illegal profits where plaintiffs have paid cash out of pocket that they should not have.

[58] *AT&T v. FCC*, 836 F.2d at 1392 ("Thus, as we previously have concluded, the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate of return prescription.").

[59] Indeed, the court in *Ohio Bell* recognized the continuing efficacy of our rate of return framework. *See* 949 F.2d at 868.

[60] *MCI Liability Order*, 5 FCC Rcd at 223, para. 56.

[61] In the *MCI Liability Order* we held that the complainant therein could prove that defendants' rates were unjust and unreasonable by proving that the defendants violated our rate of return prescription. *See MCI Liability Order*, 5 FCC Rcd at 226.

[62] *See also supra* n.60.

[63] *Illinois Bell*, 966 F.2d at 1481.

[64] *Id.* at 1483. The court stated

> We conclude that when the FCC investigates and remedies an unreasonable rate which it has theretofore permitted to become fully effective without a suspension order, it acts under § 205, not § 204. We further conclude that the Commission has no authority under § 205 to order refunds contemplated only under § 204.

Id. The court clearly did not limit or even address this Commission's authority to order damages in a Section 208 proceeding.

[65] *See Seaboard*, 442 U.S. 444, 455, n.8:

> If a shipper proves a rate is unreasonable and that he was damaged in the full amount he was overcharged, the outcome of a § 13(1) [§ 208] proceeding will be no different than that of a § 15(8)(a) [§ 204] proceeding in which the carrier fails to establish the reasonableness of the rate.

28. Consistent with our decisions in the *MCI Damages Order*, we find defendants' arguments with respect to "passing-on" to be unavailing. In rejecting this same argument, we said, "[w]hether [complainant] passed on the overcharges or absorbed them does not alter the fact that the defendants overcharged [complainant] in violation of a binding rate of return prescription and must answer for such violations."[66] The issue is not what complainants have done in response to paying excessive rates, but whether complainants have been damaged as a result of these excessive rates.

29. Nor can we accept the defendants' related claim that we should require complainants to flow through any damages they may receive to their end user customers. Sections 206-209 of the Act give private parties the right to file complaints challenging the acts or omissions of carriers and to recover monetary damages resulting from such acts or omissions. Complainants, however, are charged, as complainants are in the instant case, with the burden of establishing violations of the Act or Commission rule or order and the amount or extent of damage suffered as a consequence of such violations. Accepting defendants' flow through argument would, in effect, transform complainants' complaints into class action suits on behalf of their customers, a result neither expressly contemplated by nor consistent with the private remedy created under Sections 206-209 of the Act.

30. After carefully reviewing the evidence and arguments presented by the parties, we award Allnet $54,000 in damages based on defendant NET's excessive earnings in the traffic sensitive category during the 1987-1988 monitoring period. In reaching this amount, we have credited Allnet's claims in its opening brief that its share of NET's overearnings in the traffic sensitive category total $90,000. We have subtracted from this amount $36,000 which Allnet concedes represent underearnings attributable to Allnet's purchase of special access services from NET during the relevant period. Allnet has provided no plausible basis for accepting its revised computations based on what it describes as a symmetric reasonableness threshold of 11.60%. We hold that for purposes of determining underearnings and measuring offsets, it is appropriate to look at earnings below the 12.00% rate of return prescribed by the Commission for the period. We also reject Allnet's computations to the extent that Allnet factors in the interest amounts it seeks on its damage claims prior to computing and subtracting its prorated share of defendants' underearnings.[67] The overearnings and underearnings were realized in the same period and we see no rational basis for computing interest on the overearnings amounts prior to accounting for Allnet's prorated share of defendants' underearnings. We address Allnet's claims for interest on the damages awarded in the sections below.

31. As for Allnet's claim for damages in the base amount of $71,000 from NYT, we conclude that this amount is more than offset by underearnings in the special access category totalling $84,000, which Allnet concedes can be attributed to Allnet's purchase of interstate access services during the period in question. We do not accept Allnet's revised damages claims for the reasons discussed above.

32. With respect to Telesphere, we find that the record contains no reliable evidence or information that would provide a basis for assessing its damages claims against the NTCs or the BellSouth Companies. We note that the Bureau established clear guidelines and schedules for the exchange of damages information during the discovery phases of these proceedings. Significantly, the record reflects that Telesphere did not challenge or otherwise respond to the information and claims submitted by defendants in their responses to its interrogatories, nor did it respond to the claims made by the defendants in their initial briefs. Under these circumstances, in the absence of evidence or information that would sustain an award of damages against any of the defendants in these proceedings, we dismiss Telesphere's damages claims.

2. Interest and Attorney's Fees Claims

a. Contentions of the Parties

33. Allnet contends that it may properly use a 15% cost of money interest factor in computing its damages claims due to the affect of defendants' excessive charges on its cashflow during the period in question. The defendants, on the other hand, argue that Allnet is not entitled to interest should the Commission award damages to Allnet.[68] Defendants contend that while the Commission may award interest under Section 204 of the Act, there is no provision for the award of interest under Section 206 of the Act. Because we cannot lawfully grant Allnet a refund, defendants argue, we may not award interest.[69] Defendants further claim that an award of interest would penalize them even though they have not been accused of deliberate wrongdoing.[70] Further, defendants argue that interest is not necessary to make Allnet whole, especially since damages cannot be sufficiently ascertained. Finally, defendants argue that if interest is awarded, then it should not be calculated at the rates used in the *CC Docket No. 84-800* proceeding.

34. Allnet disputes defendants' claims that it is not entitled to prejudgment interest in connection with any ultimate damages award. Allnet contends that an award of prejudgment interest is allowed pursuant to Section 206. According to Allnet, its 15% cost of money interest rate is well below defendants' 16-24% tariffed interest rates. Allnet also argues that an award of interest is required to make it whole.[71]

b. Discussion

35. Defendants' claim that the Commission lacks the requisite authority to award interest in a Section 208 common carrier complaint proceeding has no merit. Although an award of interest does not fall squarely within the ambit of Section 208 of the Communications Act, our authority under Sections 4(i) and other sections of the Act to award interest in a common carrier complaint case is well estab-

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[66] *MCI Damages Order* at para. 31.

[67] We note that Allnet does not add "interest" or "cost of money" factors in computing the amounts that represent its underpayments to defendants for access services during the relevant period.

[68] We need not address the issue of interest with respect to Telesphere since there is no award of damages on which to award interest.

[69] NTCs' Br. at 13.

[70] *Id.*

[71] Allnet RBr. at 7.

lished.[72] The award of interest in a common carrier complaint case is thus guided by considerations of fairness. Applying this standard, we are persuaded that an award of interest is appropriate in this case. Allnet was effectively deprived of the use of the excessive amounts it paid to NET as a result of NET's unlawful rates while NET, on the other hand, enjoyed the beneficial use for a substantial period of time of funds to which Allnet rightfully has a claim. We are persuaded that interest is required not only to effect a full and fair remedy for Allnet, which paid rates higher than it would have paid had defendant earned within the prescribed level, but also to avoid any unjust enrichment of defendant stemming from its charging rates that we have determined to be unjust and unreasonable under Section 201(b) of the Act.[73] However, we reject Allnet's contention that its 15% cost of money interest factor is appropriate and necessary in this case. Allnet's claim that the 15% interest factor recaptures the "loss of use" of the excessive amounts it paid NET is speculative at best. We conclude that interest should be computed at the IRS rate for tax refunds.[74] In addition, we find that interest should begin to accrue from January 1, 1989, the day after which the 1987-1988 monitoring period ended. At that point, defendants were subject to the earnings limitations of a new monitoring period. Accordingly, we award interest calculated at the IRS rate for tax refunds[75] from defendants to Allnet from January 1, 1989 until the date of full payment to Allnet.

36. The complainants request that the Commission award reasonable attorneys' fees and costs in addition to any damages awarded in these proceedings. The Commission has previously held that it lacks the authority to award attorneys' fees or costs in a Section 208 complaint proceeding.[76] The complainants' requests in this regard are, therefore, denied.

III. AFFILIATE TRANSACTIONS

A. Contentions of the Parties

37. The second counts of both complaints allege that the defendants incurred excess expenses and investment resulting from unlawful affiliate transactions which were reflected in their rates assessed upon interstate access customers in violation of the Commission's affiliate transactions rules. According to the complainants, during the period January 1, 1987 through the present, the defendants purchased services and equipment from their unregulated affiliates NYNEX Materiel Enterprises Company (MECO), Bell Communications Research, Inc., (Bellcore) and NYNEX Corporation (NYNEX)[77] at inflated prices and that these inflated prices, through unlawful accounting entries, resulted in overcharges to ratepayers.[78] In addition, Telesphere alleges that defendants failed to adjust their 1987-1988 rate of return reports to reflect a $42.2 million dollar refund from MECO in December 1988.[79] Complainants argue that the Commission should disallow all expenses and investments resulting from excessive prices charged by affiliates and award complainants their pro rata share of the disallowances. For purposes of setting out its damages claims, Allnet has recomputed the defendants' earnings levels for the 1987-1988 period using what it claims are amounts reflecting the disallowances.

38. The defendants admit that they purchased services and equipment from their affiliates, but deny that the prices charged were excessive and that the related expenses were included in their regulated rates. The defendants argue that the complaints fail to state causes of action because they merely duplicate the Commission's allegations in its *Order to Show Cause*. According to the defendants, their responses to the Commission's *Order to Show Cause* demonstrated that they complied with the Commission's affiliate transaction rules[80] and that the prices they paid to MECO were just and reasonable. Further, defendants argue that Allnet is not entitled to any damages because the

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[72] *See* MCI Telecommunications Corp. v. American Tel. & Tel. Co., *et al.*, 94 FCC 2d 332, 343-46 (1983).

[73] *See New England Tel. & Tel. Co. v. FCC*, 826 F.2d 1101, 1113 (D.C. Cir. 1987), *cert. denied*, 109 S. Ct. 1942 (1989) (carriers may reasonably be required "to pay full interest for earnings they had no right to retain in the first place.").

[74] We believe that the rationale adopted by the Commission for applying the IRS rate in pole attachment complaint proceedings under Section 204 of the Act, 47 U.S.C. § 204, is equally applicable here. In Teleprompter of Fairmont v. C&P of West Virginia, 79 FCC 2d 232 (1980), the Commission stated:

> As a matter of fairness, we believe that the rate of interest applied in a pole attachment complaint proceeding should be readily available, easily applied, and periodically revised to reflect changes in borrowing costs. In light of these considerations, we find the interest rate for federal tax refunds and additional tax payments suitable for use in this type of proceeding. This rate appears in a variety of easily obtained official and commercial publications, and is revised on a regular basis.

79 FCC 2d at 238 [footnote omitted].

[75] The applicable IRS rates are set forth in Appendix A.

[76] *Turner v. FCC*, 514 F.2d 1354 (D.C. Cir. 1975).

[77] Although Allnet alleges that the defendants purchased services and equipment from NYNEX Corporation, it has failed to identify any transactions involving NYNEX aside from the MECO and Bellcore transactions.

[78] The complaints rely extensively on the Commission's decision in New York Telephone Company and New England Telephone and Telegraph Company, Apparent Violations of the Commission's Rules and Policies Governing Transactions With Affiliates, *Order to Show Cause and Notice of Apparent Liability for Forfeitures*, 5 FCC Rcd 866 (1990) (*Order To Show Cause*), *Proceeding Terminated Via Consent Decree*, 5 FCC Rcd 5892 (1990) (*NYNEX Consent Decree*), *recon. denied*, 6 FCC Rcd 3303 (1991) (*Reconsideration Order*), *aff'd sub nom. New York State Department of Law v. FCC*, No. 91-1362 (D.C. Cir. Feb. 9, 1993). Allnet also relies on the Report of the Federal-State Joint Audit of Bell Communications Research, Inc. (Bellcore), National Association of Regulatory Utility Commissioners (NARUC) (1992) (*Joint Audit Report*), which was prepared by staff members of state regulatory commissions and the Commission. Allnet claims that the *Joint Audit Report* shows that defendants were overcharged $12 million by Bellcore for purchases between 1984 and 1990. Allnet contends that at least twenty percent, $2.4 million, of the charges occurred during the 1987-1988 time period. *See* Allnet Br. at 7.

[79] Telesphere Complaint at para. 15.

[80] The defendants also state that the Commission's affiliate transaction rules did not become effective until January 1, 1988 and that most of the overcharges relate to years other than 1987 and 1988.

Order to Show Cause proposed (and defendants later implemented) a one-time reduction of interstate revenue requirements for defendants' 1990 Annual Access Tariff Filings. In addition, defendants admit that MECO issued price rebates in December 1988, but assert that their rate of return reports did not require adjustment. Defendants argue that they accrued the estimated 1988 MECO profits above the FCC-allowed return on investment and removed all those profits by making credit entry adjustments to representative capital and expense accounts with corresponding debit entries to a below-the-line account.[81] According to defendants, the amounts refunded by MECO at the end of the year had already been accounted for and were never reflected in their interstate rates. Defendants argue that the Commission intended the defendants' tariff adjustment to represent a one-timeremedial action to recover overcharges imposed on ratepayers in prior years.[82] Defendants argue that to allow complainants to recover damages from a Section 208 complaint would result in a double recovery for them.

39. In reply, complainants respond that their complaints state valid causes of action under the Act. Telesphere argues that defendants have cited no legal authority on which to dismiss its claims with regard to the defendants' alleged unlawful transactions. Further, complainants assert that the Commission did not state that its proposed remedy did not preclude complaints for damages stemming from defendants' practices. Allnet argues that its requests for damages go beyond the Commission's conclusions in the *Order to Show Cause*. According to Allnet, the Commission's enforcement action only involved MECO transactions while its complaints involve overcharges resulting from defendants' transactions with Bellcore as well. Thus, Allnet argues, the remedy proposed by the Commission's *Order to Show Cause* does not exclude Section 208 complaints for overcharges.

B. Discussion

40. Section 32.27 of the Commission's rules[83] prescribes mandatory federal accounting requirements for recording transactions between a regulated carrier and its nonregulated affiliates on the carrier's regulated books of account. Section 32.27(d), which governs the recordation method for the provision of services by a nonregulated entity to a regulated affiliate, requires the carrier to record the charge for the service at the prevailing rate if the nonregulated company provides the same services to third parties. Where, however, the regulated carrier receives substantially all of a service from a nonregulated affiliate, which is not also provided to unaffiliated persons or entities, Section 32.27(d) provides that

> the service shall be recorded at cost which shall be determined in a manner that complies with the standards and procedures for the apportionment of joint and common costs between the regulated and nonregulated operations of the carrier entity.[84]

41. To obtain relief in these Section 208 complaint proceedings, the complainants have the burden of establishing, through reliable evidence, that the defendants included in their regulated rates inflated investments andexpenses stemming from purchases from MECO and Bellcore at prices that exceeded the affiliates' fully distributed costs. Allnet relies primarily on the results and conclusions of the *Joint Audit Report* to support its claims of unlawful affiliate transaction and accounting rule violations during the 1987-1988 period. As noted above, the *Joint Audit Report* presents the views of state and federal staff members. In releasing certain information obtained during the *Joint Audit Report*, however, we specifically stated that we were not "adopting the federal/state staff report or endorsing any of the analysis, conclusion and recommendations in it."[85] Therefore, unless and until we formally adopt the staff report, it is not dispositive of the defendants' level of compliance with the Commission's affiliate transaction requirements. On the other hand, the complainants have made allegations regarding defendants' transactions with their affiliates sufficient to state a cause of action upon which, if proven, relief can be granted. We are not prepared to say, given the allegations before us, that the complainants should not be given the opportunity to prove that the defendants violated our affiliate transaction and accounting rules in the manner alleged. Consequently, we will defer ruling on this matter and direct the staff of the Bureau's Enforcement Division to establish a schedule for further proceedings as necessary to enable the parties to develop a full record upon which a decision can be made.[86] The parties will have a full and fair opportunity to supplement the record and develop evidence and arguments relating to defendants' affiliate transactions during the period in question.[87]

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[81] NYNEX Motion to Dismiss at 12-13.

[82] *Id.* at 12, citing *Order to Show Cause*, 5 FCC Rcd at 870-71, para. 32.

[83] 47 C.F.R. § 32.27

[84] This requirement effectively limits the nonregulated entity to the rate of return prescribed for the regulated entity. This is so because the standards and procedures for the apportionment of costs related to affiliate transactions require the regulated affiliate to record the charge from the nonregulated affiliate using a fully distributed costing methodology, which permits a return on investment calculated according to the prescribed rate of return for the regulated carrier.

[85] Bell Communications Research, Inc., Public Release of Information Obtained During Joint Audit, 7 FCC Rcd 891 (1992).

[86] In light of Telesphere's bankrupt status, we will require Telesphere's estate or a duly appointed representative to notify the Bureau's Enforcement Division within 30 days of the release of this Memorandum Opinion and Order whether it intends to pursue claims regarding defendants' affiliate transactions.

[87] With regard to the complainants' claims regarding transactions involving MECO, we note that complainants have already received refunds in the form of rate reductions implemented by the defendants pursuant to the terms of a consent decree that terminated the Commission's enforcement action. *See NYNEX Consent Decree*, 5 FCC Rcd at 5894; Annual 1990 Access Tariff Filings, 5 FCC Rcd 4177 (Com. Car. Bur. 1990). As we noted in the *Reconsideration Order*, 6 FCC Rcd at 3306, para. 26 "to the extent the relief the complainants' seek has been received through the terms of the Consent Decree, complainants must show additional facts and prove greater harm to obtain further relief." The court of appeals expressly approved this interpretation of the consent decree. *New York State Department of Law v. FCC*, slip op. at 21. Accordingly, complainants will be afforded an opportunity to prove additional damages, if any, resulting from defendants' purchases from MECO.

IV. LOBBYING AND MFJ LITIGATION EXPENSES

A. Contentions of the Parties

42. A third count in Allnet's complaints alleges that the defendants unlawfully recovered through their interstate rates, expenses for lobbying and MFJ-related litigation intended to influence the legislative and court processes, or to overturn or modify MFJ restrictions. According to Allnet, during 1988, the defendants incorrectly assigned to their operating expense accounts lobbying expenses related to efforts to influence Congress and the Executive Branch to pass legislation removing or modifying MFJ restrictions.[88] Allnet further alleges that defendants expended ratepayer funds to adjudicate the rights and restrictions of the defendants and their affiliates under the MFJ. In addition, Allnet alleges that defendants have expended funds during the relevant period to develop network features intended to be used for providing services that are prohibited by the MFJ. Allnet argues that such expenditures resulted in inflated expenses which were recovered through interstate access charges and other interstate rates.[89] As evidentiary support, Allnet relies primarily on the Bureau's decision in the *Annual 1990 Access Filing* [90] proceeding in which it claims that the Bureau found that as of 1989 the defendants and other LECs had incorrectly assigned lobbying expenses in excess of $1 million a year to regulated expense accounts. Other corroborative evidence offered by Allnet is an affidavit of a Southwestern Bell Telephone Company (SW Bell) official submitted in an unrelated complaint proceeding (Formal Complaint File No. E-90-114) which indicates that SW Bell expended $9.538 million for legislative advocacy during 1988, $2.1 million of which was allocated to interstate services. According to Allnet, this amount is more in line with the defendants' actual lobbying MFJ litigation expenditures. Allnet adds that further corroborative evidence is found in a NARUC report prepared for the United States Telephone Association (USTA) which it claims shows that the defendants incurred $52,438 in legislative advocacy costs through USTA for the 12 month period ending December 31, 1988.[91] Allnet argues that considering these factors and given the comparable size and lobbying activities of NYT and NET to SW Bell, "the total disallowance that the Commission found for the 1989 period, should similarly be applied for the 1987-1988 period."[92]

43. The defendants respond that Allnet has provided no evidence to support its claims that the Commission should disallow certain amounts included in defendants' rate base. Defendants contend that Allnet's factual showing consists solely of references to certain of their lobbying expenses disallowed by the Bureau in their 1990 access tariff filings and to purported lobbying expense misallocations by other carriers. Defendants maintain that they included expenditures directly related to communications and appearances before regulatory or other governmental bodies concerning existing or proposed operations consistent with the Commission's rules.[93] Defendants further contend that Allnet has provided no support for its claim that it is improper to record as a regulated expense the cost of MFJ-related litigation incurred in connection with telephone company activities.[94]

B. Discussion

44. We have reviewed the evidence and arguments presented by the parties and conclude that Allnet has failed to sustain its burden of demonstrating that defendants improperly recorded lobbying and litigation expenses during the period in question. Its reliance on the Bureau's *Annual 1990 Access Tariff Order*, which concerned expenditures made in 1989, the USTA study, which purports to show the level of honoraria and lobbying expenditures by USTA on behalf of its member companies, and, finally, what Allnet casts as comparable expenditures by other LECs during the period in question, falls far short of the level of proof required to sustain a claim under Section 208 of the Act. The defendants have maintained that they properly accounted for all lobbying and litigation expenditures pursuant to the requirements of Part 32 of the Commission's rules. In the absence of any showing or even allegation that defendants made specific lobbying and litigation expenditures in connection with nonregulated activities and that such expenditures were improperly included in their regulated accounts, we deny Allnet's complaint in this regard.

V. CONCLUSION

45. We have carefully reviewed the extensive record before us and have found, to the extent indicated here, that complainant Allnet is entitled to an award of damages, plus accumulated interest on such damages, from NET stemming from NET's violations of our rate of return prescription for the 1987-1988 monitoring period. We also conclude that Allnet has failed to sustain a damages claim against NYT and that Telesphere has failed to sustain a damages claim against either the NTCs or the BellSouth Companies. We have also concluded that the record is not sufficient to rule on the issues of affiliate transactions and have directed the Bureau's Enforcement Division to establish a schedule for further proceedings as necessary to develop a full record upon which a decision can be made. Finally, we have concluded that Allnet has not met its burden of proof in alleging that defendants have included certain lobbying and litigation expenses for the MFJ in their interstate revenue requirement.

VI. ORDERING CLAUSES

46. Accordingly, IT IS ORDERED, pursuant to Section 4(i), 4(j), 201, 206, 207, 208 and 209 of the Communications Act, as amended, 47 U.S.C. §§ 4(i), 4(j), 201, 206, 207, 208 and 209, that the above-captioned complaints filed by Allnet Communications Services, Inc. and Telesphere Network, Inc., ARE GRANTED to the extent discussed

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88 Allnet Complaint at para. 16.
89 *Id.* at para. 18.
90 5 FCC Rcd 4177, 4234 (Com. Car. Bur. 1990).
91 Allnet Br. at 6, *citing* NARUC Audit Report on the Expenditure of the United States Telephone Association, December 1989.
92 Allnet Br. at 7.
93 *Id.* citing 47 C.F.R. § 32.7370 (Special Charges) and 47 C.F.R. § 32.6728 (Other General and Administrative Accounts).
94 *Id.* citing 47 C.F.R. §32.6725 (Legal).

here and otherwise ARE DENIED except as indicated in Paragraphs 40-41 of this Memorandum Opinion and Order.

47. IT IS FURTHER ORDERED that the staff of Enforcement Division, Common Carrier Bureau SHALL ESTABLISH A SCHEDULE FOR FURTHER PROCEEDINGS consistent with Paragraphs 40-41 of this Memorandum Opinion and Order.

48. IT IS FURTHER ORDERED that New England Telephone and Telegraph Company SHALL PAY to Allnet Communication Services, Inc. the sum of $54,000 (fifty-four thousand dollars) within 60 days after the release date of this Memorandum Opinion and Order.

49. IT IS FURTHER ORDERED that New England Telephone and Telegraph Company SHALL PAY interest on the amount of damages awarded here at the IRS rates set forth in Appendix A from January 1, 1989 until the date full payment is made.

50. IT IS FURTHER ORDERED that the Motion to Withdraw Motion to Accept Late-Filed Pleading filed on July 9, 1990 and the Motion to Accept Late-Filed Pleading filed on April 5, 1991 by Telesphere Network, Inc. ARE GRANTED.

51. IT IS FURTHER ORDERED that the Motions to Dismiss filed on June 18, 1990 and July 20, 1990 by New York Telephone Company and New England Telephone and Telegraph Company ARE DISMISSED.

52. IT IS FURTHER ORDERED that the Application for Review filed on March 7, 1991 by Allnet Communication Services, Inc. and the Application for Review filed March 7, 1991 by Telesphere Network, Inc. ARE DISMISSED.

53. IT IS FURTHER ORDERED that the Motion to Serve Request for Production of Documents filed on August 13, 1992 and the Motion to Compel Response to Interrogatories filed on September 11, 1992 by New York Telephone Company and New England Telephone and Telegraph Company ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Effective Period	Rate	Internal Revenue Service Citation
01/01/87 - 03/31/87	8%	Rev.Rul. 146, 1986-2 C.B. 208
04/01/87 - 06/30/87	8%	Rev.Rul. 87-23, 1987-13 I.R.B. 46
07/01/87 - 09/30/87	8%	Rev.Rul. 87-62, 1987-29 I.R.B. 10
10/01/87 - 12/31/87	9%	Rev.Rul. 87-87, 1987-36 I.R.B. 8
01/01/88 - 03/31/88	10%	Rev.Rul. 87-131, 1987-50 I.R.B. 6
04/01/88 - 06/30/88	9%	Rev.Rul. 88-17, 1988-10 I.R.B. 6
07/01/88 - 09/30/88	9%	Rev.Rul. 88-50, 1988-25 I.R.B. 39
10/01/88 - 12/31/88	10%	Rev.Rul. 88-86, 1988-41 I.R.B. 1
01/01/89 - 03/31/89	10%	Rev.Rul. 88-105, 1988-51 I.R.B. 4
04/01/89 - 06/30/89	11%	Rev.Rul. 89-36, 1989-1 C.B. 309
07/01/89 - 09/30/89	11%	Rev.Rul. 89-69, 1989-1 C.B. 310
10/01/89 - 12/31/89	10%	Rev.Rul. 89-99, 1989-2 C.B. 256
01/01/90 - 03/31/90	10%	Rev.Rul. 89-125, 1989-2 C.B. 257
04/01/90 - 06/30/90	10%	Rev.Rul. 90-19, 1990-1 C.B. 186
07/01/90 - 09/30/90	10%	Rev.Rul. 90-47, 1990-1 C.B. 187
10/01/90 - 12/31/90	10%	Rev.Rul. 90-71, 1990-35 I.R.B. 4
01/01/91 - 03/31/91	10%	Rev.Rul. 90-94, 1990-46 I.R.B. 16
04/01/91 - 06/30/91	9%	Rev.Rul. 91-20, 1991-11 I.R.B. 1
07/01/91 - 09/30/91	9%	Rev.Rul. 91-33, 1991-21 I.R.B. 1
10/01/91 - 12/31/91	9%	Rev.Rul. 91-50, 1991-37 I.R.B. 1
01/01/92 - 03/31/92	8%	Rev.Rul. 91-65, 1991-51 I.R.B. 1
04/01/92 - 06/30/92	7%	Rev.Rul. 92-21, 1992-14 I.R.B. 14
07/01/92 - 09/30/92	7%	Rev.Rul. 92-44, 1992-24 I.R.B. 86
10/01/92 - 12/31/92	6%	Rev.Rul. 92-77, 1992-38 I.R.B. 12

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

HHT/Estate of	File Nos. 6865-CM-P-83
Robert D. Hanna	6902-CM-P-83
	6928-CM-P-83

Applications for Authority
to Construct and Operate
Multichannel Multipoint
Distribution Service Stations at
Enid, Oklahoma, Lawton, Oklahoma,
and Ocala, Florida

MEMORANDUM OPINION AND ORDER

Adopted: April 30, 1993; Released: May 7, 1993

By the Chief, Domestic Facilities Division:

INTRODUCTION

1. This proceeding addresses pleadings related to the proposed change of ownership by amendment of Multichannel Multipoint Distribution Service (MMDS) applications from HHT/Estate of Robert D. Hanna (hereinafter referred to as HHT) to N.D.W. Company, Inc. (hereinafter referred to as NDW.) On April 18, 1990, HHT filed a Petition for Leave to Amend the above-referenced applications to substitute NDW as the applicant for each application. The above-referenced MMDS applications were selected for qualification review as a result of Commission lotteries.[1] No oppositions to the proposed ownership change have been filed.

BACKGROUND

2. Prior to his death in 1987, the managing principal of HHT, Robert D. Hanna, filed for bankruptcy protection under Chapter 11 of the Bankruptcy Code. However, the initial proposal to reorganize was converted later to a liquidation plan under Chapter 7 of the Bankruptcy Code. On March 1, 1990, the Bankruptcy Court approved an assignment of the communications assets of the estate, including all the estate's MMDS assets, to NDW for a total fee of $26,000.[2]

DISCUSSION

3. *Rule on Application Amendments.* According to Section 21.23(b), an application tentatively selected by lottery must first demonstrate to the Commission "good cause" for the amendment prior to its approval. HHT's good cause showing included a description of severe financial hardships which made developing and perfecting wireless cable systems impossible. Also, HHT states that it was in bankruptcy after the filing of the above-referenced applications. Further, the death of its principal, Robert D. Hanna, made proceeding with its business plan virtually impossible. Under these circumstances, we find HHT has demonstrated "good cause." The concerns indicated are significant and sufficient to support acceptance of this amendment for the change of ownership of the Enid, Lawton, and Ocala MMDS applications. *See Kansas City Southern Industries, Inc.*, 3 FCC Rcd 2842 (1988); *Broadcast Data Corp.*, 97 FCC 2d 650 (Rev. Bd 1894); *Mobilfone, Inc.*, 75 FCC 2d 269 (Rev. Bd. 1979).

4. Pursuant to Section 21.23(c), a substantial change of ownership constitutes a "major amendment" and is subject to the "cut-off" procedures of Section 21.31, unless HHT demonstrates that the ownership change is "for legitimate business purposes, other than the acquisition of applications." Section 21.23(c)(6). As noted, HHT filed these amendments because it was financially unable to go forward with the development of any MMDS stations. HHT's petition further notes that the transaction with NDW was for a legitimate business purpose: to realize the maximum amount for its creditors. Consequently, we find HHT has demonstrated an independent legitimate business purpose for the substantial change in ownership, other than the acquisition of applications. *See Amendment of Parts 1 and 21 of the Commission's Rules and Regulations Applicable to the Domestic Public Radio Services (other than Maritime Mobile)*, 38 Rad. Reg. 2d 363, 373 (1976)(hereinafter cited as Part 21 Rulemaking Order). Thus, the amendments will not be classified as major amendments, and will not be subject to the cut-off provisions of Section 21.31. *See Airsignal International Inc.*, 81 FCC 2d 472, 474 (1981).

5. In accordance with Sections 21.23(b) and 21.23(e), amendments must be served upon parties of record, including mutually-exclusive applicants, as well as, those who have filed petitions to deny against the application of a tentative selectee. Thus, service is required, unless sufficient cause is demonstrated to justify a waiver under Section 21.19 of the Commission's rules. One of the primary underlying purposes of the service requirement is to provide

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[1] Section 21.23(a) of the Commission's Rules, 47 C.F.R. § 21.23(a) states, *inter alia*, "Any pending application may be amended as a matter of right if the application has not been designated for hearing or for comparative evaluation..." Pursuant to Section 21.23(b) of the Commission's Rules, 47 C.F.R. § 21.23(b) "The Commission may grant requests to amend an application... tentatively selected by the random selection process only if a written petition demonstrating good cause is submitted and properly served upon the parties of record...." HHT's application amendment was filed on April 18, 1990, past the permissible period for submitting amendments "as a matter of right" pursuant to Section 21.23(a). A tentative selectee may amend "as a matter of right" up to 14 days, after the date of the public notice announcing the lottery winning application.

[2] The determination made by the Bankruptcy Court is separate and apart from this Commission's consideration of the proposed ownership change. Pursuant to Section 21.29 of the Commission's Rules, 47 C.F.R. § 21.29 all ownership changes and agreements are subject to Commission approval. We also note that included in the sales price were all of HHT's pending MMDS applications.

actual notice to any potential parties-in-interest of the substitution of one applicant for another so that there is an opportunity to comment on the potential public benefits or detriments of the proposed ownership change and the qualifications of the prospective applicant. *See Part 21 Rulemaking Order*, 38 Rad. Reg. at 372. Here, the amendments to the above-referenced applications were served by mail on all mutually-exclusive applicants. All had an opportunity to file a Petition to Deny against the proposed amendment, but none did so.[3] Therefore, the certificate of service filed by HHT sufficiently demonstrates that HHT complied with the service requirements of Sections 21.23(b) and 21.23(e)(1) of the Commission's rules.

6. *Rule on Application Ownership Changes.* Pursuant to Section 21.29 of the Commission's Rules, parties seeking an ownership change must file the proposed amendment, together with a copy of the underlying agreement with the Commission. The Commission, in turn, will grant the application based upon whether the agreement is consistent with the public interest and whether the consideration promised is limited to "those legitimate and prudent costs directly assignable to the engineering, preparation, filing, and advocacy of the application." The agreement between HHT and NDW, as established in the written order of the Bankruptcy Court was submitted to the Commission, and the accounting demonstrates that the consideration is reasonable as it is a readily identifiable sum, consistent with what was provided. Therefore, we find that the accounting shows that HHT does not seek to unreasonably profit from the transfer of its MMDS applications. In addition, based upon the information before us, we find that the proposed ownership agreement is consistent with the public interest requirements of Section 21.29(e).

CONCLUSION AND ORDERING CLAUSES

7. In summary, we find HHT has adequately complied with the requirements of Section 21.23(b) as to a "good cause" showing and has complied with the service requirements of Sections 21.23(b) and 21.23(e)(1) of the rules. Further, pursuant to HHT's request and Section 21.23(c)(6), we find the ownership amendments will not be treated as newly filed or subject to the cut-off provisions of Section 21.31(e).

8. Accordingly, IT IS ORDERED that the request for leave to amend the above-captioned MMDS applications for Enid, Oklahoma, Lawton, Oklahoma, and Ocala, Florida IS GRANTED, and the ownership change amendments ARE ACCEPTED.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan, Chief
Domestic Facilities Division
Common Carrier Bureau

[3] We have no record of petitions to deny filed against HHT's lottery winning applications for Enid, or Ocala. Therefore, the Commission's discussions and orders In re Amendment of Sections 0.291, Delegations of Authority to Chief, Common Carrier Bureau, 7 FCC 2d 353 (1967) and In re Service of Pre-Designation Amendments to Applications, 8 Rad. Reg. 2d 1717 (1967) of the underlying purpose of this service requirement as it applies to parties who file petitions to deny are inapplicable. We note that a Petition to Deny was filed against HHT's Lawton application. The Commission addressed that Petition in a previous order. *See* In re Application of HHT/Estate of Robert D. Hanna, Memorandum Opinion and Order, DA 93-197 (March 1, 1993).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MICKELSON MEDIA, INC. — File Nos. 8619-CM-P-83, 8635-CM-P-83

Applications for Authority to Construct and Operate Multichannel Multipoint Distribution Service Stations at Brunswick, Georgia and Marianna, Florida

MEMORANDUM OPINION AND ORDER

Adopted: April 30, 1993; Released: May 7, 1993

By the Chief, Domestic Facilities Division:

INTRODUCTION

1. This proceeding addresses pleadings related to the proposed change of ownership by amendment of Multichannel Multipoint Distribution Service (MMDS) applications from Mickelson Media, Inc. (hereinafter referred to as MMI) to Century New Mexico Cable Television Corp. (hereinafter referred to as Century)[1] On April 14, 1989, MMI filed an ownership change amendment to the above-referenced MMDS applications which previously had been selected for qualification review. No oppositions to the proposed ownership change have been filed.

BACKGROUND

2. On September 9, 1983, MMI filed an MMDS application to serve Brunswick, Georgia and Marianna, Florida. Because MMI was the only applicant for Marianna, Florida, and was considered to be non-mutually exclusive, no lottery was held. Section 21.23(a) of the Commission's Rules, 47 C.F.R. § 21.23(a) permits applications selected in this manner to amend their application without a demonstration of good cause because their applications have not been designated for hearing, comparative evaluation, or tentatively selected by the random selection process. However, all amendments must comply with the provisions of § 21.29 as appropriate.

MMI's Brunswick application was selected for qualification review as a result of a Commission lottery held on June 26, 1987. The public notice announcing the selection of MMI's Brunswick application was published in *Public Notice*, Mimeo No. 3826 (June 30, 1987). Section 21.23(b) of the Commission's Rules, 47 C.F.R. §21.23(b) provides, *inter alia*,: "The Commission may grant requests to amend an application... tentatively selected by the random selection process only if a written petition demonstrating good cause is submitted and properly served upon the parties of record...." MMI's Brunswick application amendment was filed on April 14, 1989, past the permissible period for submitting amendments "as a matter of right" pursuant to Section 21.23(a). An applicant may amend "as a matter of right" up to 14 days, after the date of the public notice announcing the tentative selection.

On January 31, 1989, Century purchased all MMI stock and acquired MMI's cable television systems in several states, as well as the pending Brunswick, Georgia and Marianna, Florida MMDS applications.[2] According to MMI, the consideration paid by Century is related to the costs incurred by MMI in preparing and prosecuting the applications.

DISCUSSION

3. *Requirement for Timely Notification of Changes in Ownership*. Section 21.29(d)(1) of the Commission's Rules, 47 C.F.R. § 21.29(d)(1), requires written notification "of the existence of the agreement and general terms of such agreement, the identity of all of the participants, and the applications involved" within 10 days after entering an agreement which may result in a proposed substantial change in ownership or control. Section 21.29(d)(2) requires that a copy of the agreement, which clearly sets forth all terms and provisions, must be filed with the Commission within thirty (30) days. In its Petition, MMI states that the Stock Purchase Agreement was executed on July 29, 1988. The agreement specifically states that "MMI would transfer to Century, all of their right, title and interest in their tentative FCC selectee applications for Multichannel Multipoint Distribution Service in Brunswick, Georgia and Marianna, Florida."[3] MMI should have notified the Commission, in writing, of the existence of the agreement within ten (10) days of July 29, 1988, pursuant to Section 21.29(d)(1). *See David Laustsen and Broadcast Data Corporation*, 3 FCC Rcd 2053, 2055 (1988). Instead, MMI submitted a letter on February 28, 1989, advising the Commission of its agreement with Century, almost seven months after entering into the agreement with Century. Further, MMI also failed to submit a copy of the agreement with Century, within thirty (30) days after entering into the agreement, in accordance with Section 21.29(d)(2). *See id.* Instead, on April 14, 1989, MMI filed its request for Leave to Amend the MMDS applications of Brunswick and Marianna to reflect the change in ownership to Century, and also filed the copy of the Stock Purchase Agreement. The Commission, as well as the public, were deprived of an opportunity to examine the terms of the agreement in a timely manner. MMI acknowledges that it failed to timely notify the Commission of its agreement with Century and requests a waiver of the requirements of Section 21.29(d).[4] It argues that a waiver of the rule will serve the public

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[1] MMI is primarily engaged in providing cable television service.

[2] Century acquired the subject applications for a total cost of $17,500.

[3] Stock Purchase Agreement at 55.

[4] Section 21.19 of the Commission's Rules, 47 C.F.R. § 21.19, provides that waivers may be granted upon application or on the Commission's own motion. A request for waiver must contain a statement of reasons sufficient to justify a waiver. A waiver will not be granted except upon an affirmative showing that:

interest and would not frustrate the underlying purpose of Section 21.29. The Commission stated that one of the underlying purposes for adoption of Section 21.29 is to assure the public an opportunity to comment on ownership changes as they specifically relate to individual applications for new stations. *Amendment of Parts 1 and 21 of the Commission's Rules and Regulations Applicable to the Domestic Public Radio Service (other than Maritime Mobile),* 38 Rad. Reg. 2d 363, 374 (1976)(hereinafter cited as Part 21 Rulemaking Order). MMI circumvented the rules and prevented the Commission, as well as the public, from reviewing the terms of this agreement in a timely manner. Therefore, we find that the grant of a waiver of Section 21.29(d) is not supported because the underlying purpose of the rule would be frustrated.

4. *Service of Amendments.* In accordance with Sections 21.23(b) and 21.23(e), amendments should be served upon parties of record, which includes mutually-exclusive applicants, as well as, those who have filed petitions to deny against the application of a tentative selectee.[5] Thus, service is required, unless a waiver is requested and granted pursuant to Section 21.23(f) of the Commission's rules, 47 C.F.R. § 21.23(f).[6] One of the primary underlying purposes of the service requirement is to provide actual notice to any potential parties-in-interest of the substitution of one applicant for another so that there is an opportunity to comment on the potential public benefits or detriments of the proposed ownership change and the qualifications of the prospective applicant. *See Part 21 Rulemaking Order,* 38 Rad. Reg. 2d at 363-374 (1976). Because MMI failed to serve the mutually-exclusive applicants for Brunswick, Georgia, it requests a waiver of the service requirement. The Commission has held that a substantial change in ownership is an event which changes the identity of the applicant and requires a statutory public notice and thirty day opportunity for public comment. *Id.* at 372. Here, the proposed ownership change amendment appeared in the *Public Notice,* Report No. D-679, (January 22, 1993). Therefore, under these circumstances, the underlying purpose of the service requirement would not be frustrated by grant of the requested waiver.

5. *Cable-Cross Ownership.* MMI describes Century as a publicly traded, cable television Multiple System Operator which has actively acquired cable television properties for several years, and also serves over 700,000 subscribers nationwide. MMI also states that Century is an incumbent cable operator in both Brunswick and Marianna, with fully-operational cable facilities in Brunswick and Enterprise, Alabama, which is approximately fifty (50) miles northwest of Marianna.

While recent limits have been placed on the licensing of MMDS channels by a cable system in its franchised service area,[7] we note that at the time MMI filed its ownership change amendment, cable operators could apply for and be authorized to operate MDS channels within their franchise area. *See Notice of Proposed Rule Making and Notice of Inquiry,* 5 FCC Rcd 971, 975 (1990).[8]

CONCLUSIONS AND ORDERING CLAUSES

6. Accordingly, we find that Mickelson Media, Inc. failed to comply with Sections 21.29(d)(1), 21.29(d)(2). Because of these violations, we must deny Mickelson Media, Inc's request for leave to amend its MMDS applications for Brunswick, Georgia and Marianna, Florida.

7. This order is issued pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91 and 0.291, and is effective on its release date. Petitions for reconsideration pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. §1.106, or applications for review pursuant to Section 1.115 of the Commission's Rules, may be filed within thirty (30) days of the date of public notice of this order. See Section 1.4(b)(2) of the Commission's Rules, 47 C.F.R. § 1.4(b)(2).

> (a) the underlying purpose of the rule will not be served, or would be frustrated, by its application in the particular case, and the grant of the waiver is otherwise in the public interest; or
>
> (b) the unique facts and circumstances of a particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest. Applicants must also show the lack of a reasonable alternative.

[5] As noted above, because MMI was the only applicant for Marianna, Florida and considered to be non-mutually exclusive, no lottery was held. However, there were several mutually-exclusive applicants included in the MMDS lottery for Brunswick, Georgia. We have no record of petitions to deny filed against MMI's applications for Brunswick, Georgia or Marianna, Florida. Therefore, the Commission's discussions and order In re Amendment of Sections 0.291, Delegations of Authority to Chief, Common Carrier Bureau, 7 FCC 2d 353 (1967), and In re Service of Pre-Designation Amendments to Applications, 8 Rad. Reg. 2d 1717 (1967), of the underlying purpose of this service requirement as it applied to parties who file petitions to deny are inapplicable.

[6] Section 21.23(f) of the Commission's Rules, 47 C.F.R. § 21.23(f) provides *inter alia:*

> The Commission may waive the service requirements of paragraph (e) of this section and prescribe such alternative procedures as may be appropriate under the circumstances to protect petitioner's interests and to avoid undue delay in a proceeding, if an applicant submits a request for waiver which demonstrates that the service requirement is unreasonably burdensome...

[7] *See* Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting: Private Operational-Fixed Microwave Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service and Cable Television Relay Service, 5 FCC Rcd 6410 (1990).

[8] In the Second Report and Order, 6 FCC Rcd 6792, 6800 (1991), the Commission stated that it would grandfather cable applications for MMDS channels filed before February 8, 1990, the date the initial Notice of Proposed Rulemaking and Notice of Inquiry was adopted. Inasmuch as MMI filed its MMDS applications before February 8, 1990, it is not subject to the new Commission rules regarding cable cross-ownership restrictions.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan, Chief
Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matters of

Local Exchange Carriers'	AAD Nos. 92-22
Permanent Cost Allocation	through 92-35
Manuals for the Separation	
of Regulated and Nonregulated Costs	

ORDER

Adopted: April 30, 1993; Released: May 7, 1993

By the Chief, Common Carrier Bureau

I. INTRODUCTION

1. On April 24, 1992, the Commission invited comments on cost allocation manual (CAM) revisions filed by local exchange carriers (LECs) for the first quarter of 1992.[1] The Public Staff of the North Carolina Utilities Commission (North Carolina) and the Tennessee Public Service Commission (Tennessee) filed comments on the affiliate transactions of certain LECs.[2] These comments focus on the LECs' relationships with their affiliates that publish yellow and white page directories. The LECs filed replies[3] and the state commenters filed supplemental comments.[4] In this Order, we address the issues raised by the state commenters. We also require the Ameritech Operating Companies (Ameritech) to clarify their time reporting procedures.

II. BACKGROUND

2. In the *Joint Cost Order*,[5] the Commission required carriers with $100 million or more in annual operating revenue to file manuals describing the methods they use to separate the costs of regulated telecommunications services from the costs of nonregulated activities. These manuals must describe each of the LECs' nonregulated activities and provide information on their affiliate transactions, employee time reporting procedures, and cost apportionment methods. The Commission's rules require that each CAM include a statement identifying each affiliate that engages in or will engage in transactions with the carrier and describing the nature, terms and frequency of each transaction.[6] The Commission's rules also govern how carriers record their affiliate transactions in the accounts within the Uniform System of Accounts (USOA).[7] These rules distinguish between asset transfers and the provision of services. Generally, these rules require that the cost of any affiliate transaction that will be recorded in USOA accounts will equal either the costs the affiliate group incurs in connection with the transaction or the price non-affiliates would have paid in arms-length transactions with the affiliate group.[8] Depending on the circumstances of the transaction, these costs will reflect tariff rates, prevailing market prices or fully distributed costs.[9]

3. The LECs filed their original CAMs in 1987 and have revised them periodically since that time. Although we have issued numerous orders regarding those manuals, only one of those orders, the *U S West Compliance Order*,[10] addressed issues similar to those North Carolina and Tennessee raise. That Order is discussed in Part III(B), *infra*.

III. DISCUSSION

A. Introduction

4. In the affiliate transaction sections of their CAMs, the LECs list the directory publishing transactions between them and their directory publishing affiliates. The LECs characterize these transactions as involving the provision of services, rather than asset transfers. Generally, the services the LECs state they provide to their directory publishing affiliates include the provision of subscriber listing data, directory delivery information, and billing and collection services. Although no LECs list asset transfers in connection with directory publishing activities, United's CAM implies that the right to publish directories is an asset that has been transferred. The directory publishing affiliates generally are described as providing compiling, publishing and delivery of white and yellow page directories for the

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[1] Carriers File Revisions to Their Cost Allocation Manuals, 7 FCC Rcd 2590 (Com. Car. Bur. 1992). CAM revisions were filed by the following companies: Ameritech Operating Companies, Bell Atlantic, BellSouth Corporation, Cincinnati Bell Telephone Company, Lincoln Telephone, Nevada Bell, NYNEX Telephone Companies, Pacific Bell, Puerto Rico Telephone Company, Rochester Telephone, Southern New England Telephone Company, Southwestern Bell, United Telephone and U S West.

[2] North Carolina filed separate comments on the BellSouth Corporation (BellSouth), GTE Service Corporation (GTE), Central Telephone Company - North Carolina (Centel-N.C.) and United Telephone Companies (United) manuals. Tennessee filed separate comments on the BellSouth and GTE manuals.

[3] BellSouth, United, GTE and Centel-N.C. filed replies.

[4] North Carolina and Tennessee filed Motions to Accept Supplemental Comments. Although United opposes North Carolina's motion, we find that these supplemental comments help to focus the issues in this proceeding. We also find that the consideration of these comments will not prejudice the LECs. Therefore, we grant North Carolina's and Tennessee's motions.

[5] Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, *Report and Order*, CC Docket No. 86-111, 2 FCC Rcd 1298 (*Joint Cost Order*) *recon.*, 2 FCC Rcd 6283 (1987) (*Reconsideration Order*), *further recon.*, 3 FCC Rcd 6701 (1988) (*Further Reconsideration Order*), *aff'd sub nom.* Southwestern Bell Corp. v. FCC, 896 F. 2d 1378 (D.C. Cir. 1990).

[6] *See* Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, *Report and Order*, CC Docket No. 90-623, 6 FCC Rcd 7571, 7642-43 (1991) (adopting Section 64.903 of the Commission's Rules), *petitions for recon. pending.*

[7] 47 C.F.R. Part 32.

[8] *See* 47 C.F.R. §32.27.

[9] The Commission's affiliate transaction rules have been described in detail in numerous orders; therefore, it is not necessary to repeat that additional detail in this order. *See, e.g.*, U S West's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 195, 198 (Com. Car. Bur. 1988).

[10] U S West's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 4 FCC Rcd 481 (Com. Car. Bur. 1989) (*U S West Compliance Order*).

LECs. The majority of the CAMs on file with the Commission state that these transactions with directory publishing affiliates are provided under contracts between the LECs and their directory publishing affiliates. The CAMs use phrases such as "negotiated rate," "negotiated contract amounts" and "no charge" to describe the terms of these transactions.

5. In their comments North Carolina and Tennessee focus on three areas: (1) the terms of affiliate transactions provided under contracts with the directory publishing affiliates; (2) the failure of the CAMs to list yellow pages publication as an activity in which the LECs engage; and (3) the failure of the LECs to record all directory revenues in their regulated books of account. The LECs contend that their CAMs treat directory publishing activities properly. In addition, Centel-N.C. raises certain procedural issues.

B. Affiliate Transaction Rules

1. Parties' Arguments

6. North Carolina and Tennessee state that the terms of affiliate transactions provided under contracts between the LECs and their directory publishing affiliates are inconsistent with the Commission's rules on affiliate transactions involving the provision of services.[11] North Carolina and Tennessee argue that since directory publishing affiliate transactions do not occur at tariff rates or market rates, they should be priced at fully distributed costs.[12] Tennessee requests that we clarify whether the affiliate transaction rules apply to all affiliate transactions.[13] North Carolina provides several examples of instances where the LECs use negotiated contract provisions as the terms of directory publishing affiliate transactions. North Carolina also provides instances where the LECs use vague terms to describe their transactions with these directory publishing affiliates.

7. North Carolina states that BellSouth lists the "percentage of gross directory revenue less uncollectible per publishing agreements" as the terms for billing and collection, subscriber listing data and other services that it provides to its nonregulated affiliate. North Carolina states that BellSouth's nonregulated affiliate provides compiling, publishing, and delivery of white pages directories, and collection services to BellSouth at "negotiated contract amounts per publishing agreements."[14] Tennessee alleges that BellSouth's use of negotiated contract prices is not acceptable under the Commission's rules. Tennessee claims that BellSouth's use of negotiated contract prices, instead of fully distributed costs, has allowed BellSouth to divert approximately $240 million in revenue from the intrastate ratemaking process.[15]

8. North Carolina argues that although the GTE Operating Companies (GTOCs) provide certain services to their directory publishing affiliate "at cost," the term "cost," as used in the GTE CAM, is based on a revenue sharing arrangement contained in the contract between the GTOCs and their directory publishing affiliate. North Carolina also argues that under this contract, the nonregulated affiliate provides certain services to the GTOCs at "[n]o charge". North Carolina alleges that if there were no charge for these services, then the affiliate would receive no revenue.[16]

9. North Carolina argues that Centel-N.C. and United use vague terms in describing transactions with their directory publishing affiliates. North Carolina states that Centel uses "market if available, otherwise not less than cost" as the terms for billing and collection services.[17] North Carolina also states that in describing certain directory publishing transactions, United uses such terms as: "at estimated fair market value," "at not less than fully distributed cost," and "at no greater than fully distributed cost". In addition, North Carolina claims that United provides no support for its use of market rates for other directory publishing transactions. According to North Carolina, United's CAM indicates that the pricing of these transactions is not in compliance with the Commission's rules, and United's CAM states that this is appropriate as long as the ratepayer benefits.[18]

10. In their replies, the LECs assert that their CAMs comply with the Commission's rules.[19] According to BellSouth, its use of "percentage of gross directory revenues less uncollectible per publishing agreements" describes, as precisely as possible, the valuable ratepayer subsidy it receives as a result of its contractual relationship with its directory publishing affiliate.[20] GTE states that the GTOCs contractual relationship with their directory publishing affiliate is a joint venture in which gross revenues are shared after each party has carried out its responsibilities and borne the associated cost. GTE claims that for transactions that are not part of the joint venture, the GTOCs charge their directory publishing affiliate at least fully distributed costs and the directory publishing affiliate charges the GTOCs an amount that does not exceed fully distributed costs.[21] Centel states that it provides its directory publishing affiliate with certain specified services in exchange for white and yellow pages directories plus a negotiated payment. Centel adds that this payment reflects market prices.[22]

11. The LECs argue that under their directory publishing contracts, the payments they receive exceed the fully distributed costs of the services they provide to their directory publishing affiliates, and that, therefore, the ratepayer benefits.[23] To support its argument that it is in compliance with the rules, GTE cites the *U S West Compliance Order*[24] and a

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[11] *See, e.g.*, North Carolina Comments on United at 7; Tennessee Comments on GTE at 6.
[12] *See, e.g.*, North Carolina Comments on Centel at 8; Tennessee Comments on GTE at 7.
[13] *See, e.g.*, Tennessee Comments on GTE at 10.
[14] North Carolina Comments on BellSouth at 7.
[15] Tennessee Comments on BellSouth at 7.
[16] North Carolina Comments on GTE at 7-8.
[17] North Carolina Comments on Centel at 3 and 7.
[18] North Carolina Comments on United at 8-10.
[19] GTE Reply at 3; BellSouth Reply at 8; United Reply at 3. Centel-N.C. Reply at 9.
[20] BellSouth Reply at 7.
[21] GTE Reply at 10-11.
[22] Centel-N.C. Reply at 12-13.
[23] Bell South Reply at 7-8; Centel-N.C. Reply at 12-13; United Reply at 10; GTE Reply at 11-12.
[24] *U S West Compliance Order*, 4 FCC Rcd 481.

Commission staff letter.[25] GTE states that in the *U S West Compliance Order*, the Common Carrier Bureau (Bureau) found that a directory publishing arrangement that guaranteed the operating companies their "fully distributed cost plus subsidy" was consistent with the Commission's rules.[26] According to GTE, the staff letter states that if a company wishes to choose a pricing method which benefits the ratepayer, the company should be allowed to do so even though the method is not in strict compliance with the rules.

12. BellSouth and GTE argue that North Carolina and Tennessee are asking the Commission to rewrite directory publishing contracts.[27] BellSouth asserts that the Commission's rules govern the entries that are permitted on the regulated books of account, rather than contractual relationships with nonregulated affiliates.[28] BellSouth, GTE and United argue that in the *U S West Compliance Order*, the Bureau stated that the carriers are not required to structure their directory publication operations in any particular way.[29]

13. According to United, its affiliate transaction involving the right to publish directories and solicit advertising is not a service governed by Section 32.27(d) of the Commission's rules,[30] but rather an asset transfer governed by Section 32.27(c) of those rules,[31] United claims that some state commissions recognize the right to publish directories as an asset.[32] In its supplemental comments, North Carolina argues that nowhere in its CAM does United describe this directory transaction as an asset transfer.[33]

2. Analysis

14. Section 64.903 of the Commission's rules[34] requires carriers to describe the terms of their affiliate transactions in their CAMs.[35] Section 32.27(d) provides for the use of three specific terms in affiliate transactions involving services: tariff rates, prevailing market prices and fully distributed costs. The services at issue are not provided under tariff; therefore, prevailing market prices and fully distributed cost are the only options under the rules. In order to use prevailing market prices, the provider of the service must also have substantial third party sales. However, the carrier need not prove in its CAM that a prevailing market price is appropriate. Instead, the listing of prevailing market price as the term for a transaction constitutes an implied representation that the carrier provides the same service to a sufficient number of unaffiliated persons or entities to establish a market price. This representation is subject to verification.[36]

15. The existence of a joint venture or the use of a contract to govern transactions between a carrier and its directory publishing affiliate does not excuse the carrier from adherence to Section 32.27. In the *U S West Compliance Order*, the Bureau addressed U S West's directory publishing operations and acknowledged that carriers may structure these operations as they deem appropriate. However, that Order does not give the LECs license to circumvent the affiliate transaction rules. To the contrary, the Order clearly states our intent to rely upon the disclosure contained in the CAMs to help ensure carriers' compliance with the affiliate transaction rules.[37]

16. In the *U S West Compliance Order*, the Bureau found a "fully distributed cost plus subsidy" arrangement acceptable for U S West's transactions with its directory publishing affiliate. However, it did not authorize carriers' use of negotiated contracts and other terms not permitted under the rules. The term "FDC plus subsidy" recognizes the additional revenue that flows to the telephone company. It was determined from the Bureau's examination of the record in that proceeding that U S West was recovering revenue in excess of FDC. LECs may receive additional revenue from their directory publishing affiliates without a waiver of the affiliate transaction rules. However, in its CAM the LEC must state that it does recover its fully distributed costs from its directory publishing affiliate and that any additional payment does, in fact, represent a subsidy. In their CAMs, the LECs must separately identify each transaction that occurs between them and their directory publishing affiliates and they must identify the terms for each of these transactions. If a LEC wishes to use terms that are not provided for, that LEC must seek a waiver of the Commission's affiliate transaction rules.

17. In their CAMs, most LECs list their transactions with directory publishing affiliates as the provision of services rather than the transfer of assets. However, according to its CAM, United "provides the right to publish its directory to [its directory publishing affiliate] at the estimated fair market value on an ongoing basis."[38] United claims that this transaction is "appropriately defined as an asset transfer because of the contractual arrangement between the parties whereby something of value is granted by United to [its directory publishing affiliate]."[39] We do not view this transaction as involving an asset transfer within the meaning of the affiliate transaction rules. Rights to publish are intangible benefits and are not covered by our asset transfer rules. Indeed, in adopting those rules, in the *Joint Cost* proceeding, the Commission found that the allocation of intangible benefits was outside the scope of that proceeding.[40] Therefore, United must revise its CAM to list the provision of the right to publish yellow pages as a service its operating companies provide its directory publishing affiliate and to provide terms for that service that are consistent with paragraph 16, *supra*.

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[25] Letter from Jose-Luis Rodriguez, Chief, Audits Branch, to Sheryl Herauf, Director, Federal Regulatory Matters, Pacific Telesis Corporation (March 20, 1992).

[26] GTE Reply at 11-12.

[27] BellSouth Reply at 1; GTE Reply at 3.

[28] BellSouth Reply at 14.

[29] BellSouth Reply at 9, n.12; GTE Reply at 6; United Reply at 7-8.

[30] 47 C.F.R. §32.27(d).

[31] 47 C.F.R. §32.27(c).

[32] United Reply at 6.

[33] *U S West Compliance Order*, 4 FCC Rcd at 485, para. 40.

[34] 47 C.F.R. §64.903.

[35] The states apparently believe that the "terms" of the transactions refers to the prices paid by the affiliates or carriers. In fact, the terms refers to how the carriers must record the transactions on their regulated books of account.

[36] *See U S West Compliance Order*, 4 FCC Rcd at 485, para. 42.

[37] *Id.*, at 485, para. 40.

[38] United CAM Section 5 at 6-7.

[39] United Reply at 6.

[40] *Joint Cost Order*, 2 FCC Rcd at 1304, para. 41. *See also* Ameritech Operating Companies' Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 433, 437, para. 40 (Com. Car. Bur. 1988).

C. Disclosure of Affiliate Transactions in the CAMs

1. Arguments

18. North Carolina and Tennessee argue that BellSouth and United have improperly revised their CAMs to remove references to transactions involving yellow pages.[41] According to the states the provision of yellow pages is a public utility function which should be listed in the affiliate transaction section of the CAMs as a service that the directory publishing affiliates provide the operating companies.[42] In support of their arguments, these states explain that historically the LECs published their own directories and the revenue from yellow pages advertising subsidized local telephone rates. The states assert that over the years the LECs have moved directory publication from the telephone company to nonregulated affiliates to foster the perception that yellow pages is a separate line of business and to divert yellow pages revenue from the intrastate jurisdiction. As additional support for their argument, the states contend that creation of a nonregulated affiliate to publish yellow pages is contrary to Judge Greene's intent, in the Modification of Final Judgment,[43] to keep the yellow pages within the telephone operating companies.

19. Tennessee notes that BellSouth deleted yellow pages from its CAM in September 1990 after state audit findings revealed that it had allegedly diverted approximately $240 million of yellow page revenues from the intrastate ratemaking process. North Carolina and Tennessee assert that BellSouth responded to this audit finding by claiming that the publication of yellow pages is not related to the regulated telephone service and that the nonregulated affiliate published yellow pages as a line of business for itself and not for the telephone company.[44] According to North Carolina, this claim contradicts the agreement between BellSouth and its directory publishing affiliate. North Carolina states that this affiliate has the exclusive right to publish directories for BellSouth subscribers and markets the directories using the name of the telephone companies.[45] Tennessee requests that we clarify whether the Commission's silence on a proposed CAM revision indicates approval.[46]

20. In its reply, BellSouth states that its publishing contracts cover both white pages directories, which its nonregulated affiliate publishes and delivers to fulfill BellSouth's regulatory obligations in each state, and yellow page directories, which BellSouth is not required to publish. BellSouth explains that under the contract the directory publishing affiliate pays approximately $600 million annually for exclusive rights to use the trademarked names and logos of BellSouth's telephone companies in connection with yellow pages directories. BellSouth maintains that although its directory publishing affiliate receives substantial value from using these names and logos in its yellow page operations, this use does not imply that ownership of the directories rests with the telephone companies.

21. BellSouth asserts that the *U S West Compliance Order* states that the Commission classifies the publication of yellow page directories as a nonregulated activity.[47] In its supplemental comments, Tennessee argues that treating yellow pages publication as a nonregulated activity is inconsistent with Section 32.5230 of the Commission's rules.[48]

2. Analysis

22. Under the Commission's rules, costs and revenues associated with carriers' yellow pages publishing activities are treated as nonregulated for federal accounting purposes. Tennessee argues that treating yellow pages publication as a nonregulated activity is inconsistent with Section 32.5230 of the Commission's rules, which requires that revenue derived from classified directories shall be included in Account 5230, Directory Revenue. Nonregulated treatment of directory publishing activities is not inconsistent with Account 5230, Directory Revenue, as Tennessee believes. Account 5230 includes both regulated directory revenue and nonregulated directory revenue. Similar to other so-called regulated accounts, Account 5230 is allocated between regulated and nonregulated activities as required by the Commission's joint cost rules. The Commission adopted this treatment in order to assure that carriers did not recover the costs of yellow pages publication through interstate rates.[49] However, our review of the carriers' CAMs indicates that they do not allocate directory revenue between their regulated and nonregulated activities. Therefore, we direct the LECs to separate the regulated and nonregulated revenues included in Account 5230, Directory Revenue. This accounting treatment does not affect the states' authority to use revenue from yellow pages operations to reduce intrastate rates.

23. We are not persuaded by Tennessee's and North Carolina's arguments regarding the treatment of yellow pages in BellSouth's and United's CAMs. BellSouth's CAM lists the right to publish directories as a service that the LECs provide to the directory publishing affiliate and, in paragarph 17, we have directed United to list the right to publish directories as a service that it provides to its directory publishing affiliate. Both CAMs list the publication of white pages directories as a service that the directory publishing affiliates provide to the LECs. The Commission's rules do not require that carriers list yellow pages as a service that the directory publishing affiliate provides to the LEC because yellow pages activities are not a public utility function for federal accounting purposes.

D. Accounting for Directory Revenue

1. Arguments

24. North Carolina contends that the LECs' Part 32 accounts understate directory revenue because the LECs record directory revenue and related expenses in accor-

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[41] North Carolina Comments on United at 10-11; North Carolina Comments on BellSouth at 7; Tennessee Comments on BellSouth at 6.

[42] *See, e.g.*, Tennessee Comments on BellSouth at 2-6; North Carolina Comments on BellSouth at 20-23.

[43] *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 194 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

[44] North Carolina Comments on BellSouth at 9-10; Tennessee Comments on BellSouth at 6-7.

[45] North Carolina Comments on BellSouth at 12-15.

[46] *See, e.g.*, Tennessee Comments on BellSouth at 13-15.

[47] BellSouth Reply at 9-13.

[48] 47 C.F.R. §32.5230.

[49] *Joint Cost Order*, 2 FCC Rcd at 1308, para. 78, & 1350, n.149. *See also U S West Compliance Order*, 4 FCC Rcd at 485, para. 41.

dance with revenue sharing percentages contained in their contracts with directory publishing affiliates. According to North Carolina, Section 32.27(d) requires that the LECs' regulated accounts record as directory revenue the difference between the total amount of directory revenues and the fully distributed costs of the nonregulated affiliates' publishing and related activities. North Carolina explains that the LEC and the nonregulated affiliate each receive a percentage of revenue from which they deduct their costs of providing services. North Carolina contends that the percentage of revenue the nonregulated affiliate keeps is more than its fully distributed costs of providing service to the LEC. However, North Carolina states that the affiliate transaction rules prohibit the directory publishing company from charging the telephone company more than the directory company's fully distributed costs. North Carolina requests that we require the LECs to account for directory revenue and related expenses on their regulated books in accordance with the rules. North Carolina emphasizes that its request is an accounting request and not a ratemaking request.[50]

25. North Carolina and Tennessee assert that they do not accept the LECs' revenue sharing percentages for intrastate ratemaking purposes. They state that their respective jurisdictions have increased the amount of directory revenue used to offset local service rates.[51] North Carolina explains that although the total amount of directory revenue and expenses is assigned to the LECs' intrastate jurisdiction, the Commission has the responsibility to require the LECs to account for total company revenues, expenses and plant investment as required by Part 32.[52] Tennessee requests that we clarify whether the Commission will enforce its affiliate transaction rules if the impact of the transaction is solely on the intrastate jurisdiction.[53]

26. In their replies, the LECs state that North Carolina and Tennessee raise intrastate ratemaking issues that should be addressed by the state commissions.[54] United and Centel-N.C. argue that North Carolina is attempting to use the CAM process to increase revenue available for state ratemaking purposes.[55] United argues that the yellow pages revenues to which it is entitled are included in the base fee set by the contract between it and its directory publishing affiliate.[56] BellSouth states that when its directory publishing affiliate was created, the publishing fee agreement provided that a certain percentage of directory advertising revenue would be paid to the telephone companies to insure that the local rate subsidy provided by yellow pages revenue would continue. According to BellSouth, the use of a revenue percentage results in an increasing contribution to local service revenue requirements and insulates ratepayers from any cost increases and business risks that the directory publishing affiliate might encounter.[57]

27. In its supplemental comments, Tennessee argues that since yellow pages operations have not been preemptively deregulated, Section 32.23(a) of the Commission's rules[58] requires that all yellow pages revenue be recorded on the regulated books. Tennessee claims that there is no provision that allows the LEC to delete from its regulated books a portion of regulated revenue.[59] North Carolina states that GTE can record the excess payments to its directory publishing affiliate as a negative amount in a nonregulated or below-the-line account.[60]

2. Analysis

28. The states want us to require the LECs to record all the directory revenue affiliate groups receive in the LEC's USOA accounts. However, the Commission's rules do not require that LECs book revenue that their affiliates receive, and we will not require such action.[61] In response to Tennessee's concern, we will enforce the Commission's affiliate transaction rules whenever we become aware of possible violations. We will also take whatever steps are necessary to remedy any violations of the affiliate transaction rules whether the impact of the violation is in the interstate or intrastate jurisdiction.

E. Procedural Issues

1. Argument

29. Centel-N.C. provides three reasons why North Carolina's comments on its CAM should be dismissed. First, according to Centel-N.C., North Carolina's comments constitute a untimely request for reconsideration because the comments seek Commission review of provisions which were previously approved in Bureau orders. Centel-N.C. claims that the Bureau most recently approved Centel's CAM in an order released November 13, 1991,[62] and that North Carolina's comments were filed more than 30 days after that date. Second, Centel-N.C. argues that its CAM was not open for comment because it filed no revisions for the first quarter of 1992. Third, Centel-N.C. states that although it adheres to the Centel CAM, it is not required to file a CAM because its operating revenue has not exceeded $100 million for five consecutive years.[63]

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[50] *See, e.g.*, North Carolina Comments on BellSouth at 4 and 21-23; *see also* North Carolina Supplemental Comments on GTE at 7-9; North Carolina Supplemental Comments on United at 4-6.

[51] *See, e.g.*, North Carolina Comments on BellSouth at 22; Tennessee Comments on BellSouth at 5.

[52] *See, e.g.*, North Carolina Comments on BellSouth at 24.

[53] *See, e.g.*, Tennessee Comments on BellSouth at 14.

[54] BellSouth Reply at 1; United Reply at 11; GTE Reply at 12.

[55] United Reply at 13, Centel-N.C. Reply at 13-14.

[56] United Reply at 13.

[57] BellSouth Reply at 3-4.

[58] 47 C.F.R. §32.23(a).

[59] Tennessee Supplemental Comments on BellSouth at 7.

[60] North Carolina Supplemental Comments on GTE at 12.

[61] Because the *Joint Cost Order* classified yellow pages publication as a nonregulated activity, Tennessee's argument regarding Section 32.23(a) of the Commission's rules is misplaced. *See* Detariffing the Installation and Maintenance of Inside Wiring, *Third Report and Order*, CC Docket No. 79-105, 7 FCC Rcd 1334 (1992). We note, however, that the states are free to follow different accounting policies for yellow pages for intrastate regulatory purposes. *Id.*

[62] *See* Cost Allocation Manuals of The Ameritech Operating Companies, Bell Atlantic Telephone Companies, BellSouth Corporation, Central Telephone Company, NYNEX Telephone Companies, Rochester Telephone Corporation, Southwestern Bell Telephone Company, Southern New England Telephone Company and U S West, 6 FCC Rcd 6603 (Com. Car. Bur. 1991).

[63] Centel-N.C. Reply at 5-9.

2. Analysis

30. We do not agree with the procedural arguments raised by Centel-N.C. First, Centel's CAM has not been approved since the Bureau's initial review process. Between 1987 and 1989 the Bureau issued orders conditionally approving the CAMs of each LEC. However, since this approval process, the LECs have filed numerous revisions to their CAMs. Although CAM revisions become effective 60 days after the filing date unless the Bureau rejects or stays them, the absence of a rejection order or a stay does not indicate that the Bureau has approved the revisions. Second, just as carriers have the right to seek to revise their CAMs on a quarterly basis without any showing of changed circumstances, commenters have the right to challenge the carriers' CAMs. Finally, Centel-N.C. errs when it states that it is not required to file a CAM because its operating revenue has not exceeded $100 million for five consecutive years. Section 64.903 of the Commission's rules require that each LEC with annual operating revenues of $100 million or more file a CAM with the Commission.[64] Records on file with the Commission indicate that Centel-N.C.'s revenue exceeded $100 million in 1990 and 1991.[65] Therefore, Centel-N.C. is subject to the CAM filing requirement. Accordingly, we require Centel-N.C. either to file its own CAM or to have itself listed as an operating company subject to the Centel CAM.

F. Summary

31. In their CAMs, the LECs use a variety of terms to describe transactions with their directory publishing affiliates. Many of these terms are inconsistent with the Commission's affiliate transaction rules. However, our review of the CAMs indicates that, generally, the LECs are providing services to their directory publishing affiliates at fully distributed costs plus subsidy. In response to the questions raised by Tennessee and North Carolina, we require the LECs with directory publishing affiliates to review their CAMs to determine if the terms of their transactions with these affiliates comply with the Commission's affiliate transaction rules as discussed above. All transactions with affiliates must be listed; the terms for each transaction must be shown in the CAM; and, except as specified below, these terms must be tariffed rates, fully distributed costs or prevailing market prices. For any particular transaction, the use of a different term is permissible only upon a showing as to why it is more favorable for ratepayers than the terms provided in the affiliate transaction rules. If a LEC wishes to use a term that is inconsistent with these requirements, that LEC must file for, and obtain, a waiver.

G. Other Issues - Ameritech CAM

32. Our review of the time reporting section of Ameritech's CAM indicates that the procedures described in the CAM are too general. We are specifically concerned about the time reporting procedures relating to sales and marketing employees. In our audits of the Ameritech operating companies, we have found significant variations among the time reporting procedures for the operating companies' sales and marketing employees. These variations are not reflected in Ameritech's CAM. In addition, Ameritech's CAM does not describe the positive time reporting procedures[66] used by sales and marketing employees that also use exception time reporting procedures.[67] We require Ameritech to amend its CAM to provide a more detailed description of the time reporting procedures used by sales and marketing employees in each of its operating companies.

IV. ORDERING CLAUSE

33. Accordingly, IT IS ORDERED, That each local exchange carrier subject to the cost allocation manual filing requirement must review its treatment of directory publishing operations to ensure that it is consistent with paragraphs 17, 24 and 32 of this Order.

34. IT IS FURTHER ORDERED, That the United Telephone Companies SHALL AMEND their cost allocation manual to list the right to publish its directory as the provision of a service and to revise the terms of this transaction accordingly.

35. IT IS FURTHER ORDERED, That each local exchange carrier subject to the cost allocation manual filing requirement must allocate revenue included in Account 5230, Directory Revenue, between its regulated and nonregulated activities.

36. IT IS FURTHER ORDERED, That Central Telephone Company-North Carolina file its own cost allocation manual or have itself listed as an operating company subject to the Central Telephone Company cost allocation manual.

37. IT IS FURTHER ORDERED, That the Ameritech Operating Companies SHALL AMEND the time reporting procedures in their cost allocation manual to include a detailed description of the positive and exception time reporting procedures used by the sales and marketing employees in each of its operating areas.

38. IT IS FURTHER ORDERED, That the LECs SHALL FILE any cost allocation manual revisions required by this Order as part of the first quarterly filing due at least 30 days after the release of this Order.

39. IT IS FURTHER ORDERED, That the Motions to Accept Supplemental Comments filed by the Tennessee Public Service Commission and the Public Staff of the North Carolina Utilities Commission ARE GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

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[64] 47 C.F.R. §64.903.

[65] *See* Centel-N.C. ARMIS Report 43-01, Quarterly Report for the 4th Quarter of 1990 (filed April 1, 1991); Centel-N.C Quarterly Report for the 4th Quarter of 1991 (filed October 15, 1992).

[66] In positive time reporting, an employee's day is parcelled into increments of time, typically six minutes to one hour in length. The employee then accounts for the time worked during a given day by dividing the total amount of hours worked among specific jobs or functions performed.

[67] In exception time reporting, an employee's day is preassigned to a specific job or function. The employee reports only those increments of time that differ from the preassigned job or function.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

Application of Group Six Communications, Inc.
Licensee of Station WWOC-FM
Avalon, New Jersey
for Renewal of License[1]

File No. BRH - 910201WP

MEMORANDUM OPINION AND ORDER AND NOTICE OF FORFEITURE

Adopted: April 13, 1993; Released: May 7, 1993

By the Commission:

I. INTRODUCTION

1. The Commission has before it a Petition for Reconsideration filed by the former licensee of WWOC-FM of our *Memorandum Opinion and Order (Order), Application of Group Six Communications, Inc., Licensee of Station WWOC-FM Avalon, New Jersey for Renewal of License*, 7 FCC Rcd 1815 (1992). In our *Order*, we concluded that the then licensee's failure to comply with the Commission's EEO Rule warranted imposition of reporting conditions and a Notice of Apparent Liability (NAL) in the amount of $20,000. *See* 47 C.F.R. 73.2080. The licensee asserts error in our finding that its financial records reflect sufficient funds to cover a forfeiture. It requests waiver of the forfeiture based on financial inability to pay. For the reasons noted herein, we are unconvinced that reconsideration is justified; therefore, our *Order* stands. Further, by this *Order*, we impose a Notice of Forfeiture for $20,000 against Group Six Communications, Inc. for violation of our EEO Rule.

II. PROCEDURAL MATTERS

2. The licensee does not dispute the Commission's findings as they relate to its EEO program efforts and responsibilities. It does, however, contest the NAL based on its purported inability to pay. The licensee disagrees with our finding that it has the funds available to cover a forfeiture and identifies several factors which it states reflect its financial difficulty. It requests the waiver of our Notice of Apparent Liability for $20,000.

III. DISCUSSION

3. Reconsideration is appropriate where the petitioner shows either a material error or omission or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters. *See WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966); 47 C.F.R. Section 1.106(c). In response to our *Order*, the licensee submitted an attachment of financial statements regarding WWOC-FM and its other broadcast operations.[2] These financial statements are identical to the statements submitted prior to issuance of our *Order*. None of the subject financial statements are acceptable because they were not prepared under generally accepted accounting principles.

4. According to Section 503(b)(2)(D) of the Communications Act, the licensee's ability to pay may be properly considered in mitigation of a forfeiture. Section 1.80(f)(3) of our rules provides that "[a]ny showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." As the attachment to the NAL indicates, if the licensee is claiming financial inability to pay, it is directed to furnish data to support the claim, which must contain (but is not limited to) a profit and loss statement containing data no older than one year from the date of the response and prepared under generally accepted accounting principles. As the NAL attachment also indicates, the profit and loss statement must include income from broadcast or cable operations, expenses from broadcast or cable operations (including noncash expenses such as amortization and depreciation), payments to principals (including salaries, commissions, management fees, interest, rents, etc.).

5. On December 13, 1991, prior to issuance of our *Order*, the licensee of WWOC-FM submitted financial statements which we reviewed and concluded that the submission failed to demonstrate an inability to pay a forfeiture. Based on our examination, we noted that the licensee's statement did not contain a payments to principals entry and appeared to reflect funds available to cover a forfeiture. Given the inadequacy of the licensee's submission, we noted in the *Order* that the licensee could "submit more detailed financial information in response to the NAL as part of a request for mitigation of the forfeiture." The licensee failed to alter its presentation which, by its

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[1] The Commission granted the assignment of WWOC-FM to Ocean Media, Inc. (File No. BALH - 910723HO) on September 13, 1991. The station's call sign was changed to WXNJ-FM on March 27, 1992 following consummation of the sale on March 24, 1992.

[2] Among the factors the licensee requested we consider are the following: 1) Operating income statements for WWOC-FM and WCLI/WZKZ-FM (Group Six Communications's other broadcast operation) for the year ending 12/31/91 indicate an aggregate loss of $53,000. (The licensee stated that final consolidated financial statements showing balance sheet information had not been prepared because it did not have funds to pay an accountant.); 2) Bank and subordinate lender debt was approximately $3.1 million as of June 30, 1991; 3) No rents, interests, management fees nor any other distributions were made to any of the principals in 1991 or any other year; 4) No salaries or other payments were paid to any other stockholders. According to the statement, the president of Group Six Communications, Inc. received $18,000 in 1991 for his work as corporate president and WWOC-FM station manager.

own admission, was not prepared under generally accepted accounting principles.[3] Thus, the documentation fails to meet our standard for review of financial data.

IV. CONCLUSION

6. Upon review of the licensee's arguments and submissions, we conclude that our original decision renewing WWOC's license subject to reporting conditions and a Notice of Apparent Liability for forfeiture in the amount of $20,000 was appropriate. Accordingly, we deny the licensee's petition for reconsideration and impose a Notice of Forfeiture in the amount of $20,000.

V. ORDERING CLAUSES

7. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed by Group Six Communications, Inc., former licensee of WWOC-FM IS DENIED and the station's renewal grant remains subject to reporting conditions. IT IS FURTHER ORDERED pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. Section 503(b), that Group Six Communications, Inc. FORFEIT to the United States the sum of twenty thousand dollars ($20,000) for the wilful and repeated violation of Section 73.2080 of the Commission rules, 47 C.F.R. Section 73.2080. Payment of the forfeiture may be made by mailing to the Commission a check or different instrument payable to the Federal Communications Commission. In regard to this forfeiture proceeding, the licensee may take any of the actions set forth in Section 1.80 of the Commission's rules and Section 504(a) of the Communications Act of 1934, as amended, as summarized in the attachment to this Order.

8. IT IS FURTHER ORDERED that the Mass Media Bureau send by Certified Mail -- Return Receipt Requested -- one copy of this Memorandum Opinion and Order to all parties.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[3] In its reconsideration, the licensee stated that it could not afford an accountant to prepare its financial submissions. We note, however, that the documentation regarding WCLI/WZKZ-FM indicates that it is an accountants' compilation report. In a separate statement, the accountants indicate that management had elected to omit all of the disclosures and statements of retained earnings and cash flows required by generally accepted accounting principles. They concluded that because they had not audited or reviewed the accompanying financial statements, they did not express an opinion or any form of assurance regarding the statements. Moreover, WWOC was sold on March 24, 1992, and there is nothing before us to show that the licensee's debts were greater than the purchase price.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: May 7, 1993

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON NATIONAL UTILITIES, INC. AND BETTLES TELEPHONE CO., INC. PETITION FOR WAIVER OF SECTION 69.605(c)

On April 13, 1993, National Utilities, Inc. (NUI) and Bettles Telephone Co., Inc. (Bettles) filed a petition for waiver of the Commission's rule precluding companies from converting from settlement on a cost basis to settlement on an average schedule basis. See 47 C.F.R. § 69.605(c). NUI states that it converted to a cost basis company on January 1, 1991, and Bettles converted to a cost basis company on July 1, 1991. The companies seek a waiver to return to average schedule settlements.

The companies state that they are seeking a waiver because of a recent change in the Alaska Public Utilities Commission's (APUC) requirements for settlements. According to the companies, in the past, a company could be a cost basis company on the federal side, but receive average schedule treatment on the state side. The companies state, however, that the APUC recently changed its policy and only average schedule companies on the federal side will be entitled to average schedule treatment on the state side. The companies state that with the new APUC requirements, they will be required to undertake both federal and state cost studies and to participate in annual state rate proceedings.

The companies argue that this change will impose significant expense and burdens that would not have been imposed if the companies remained average schedule companies. The companies state that they were reluctant to convert to a cost basis settlement, but the level of payments under the average schedules, coupled with the termination of certain transition payments, were causing significant economic disruption for the companies. The companies state that, although average schedules were designed to simulate costs for the "average" company, NUI and Bettles are high-cost small companies operating in Alaska under unusually harsh conditions, and the average schedule settlements at that time under-compensated the companies.

The companies argue that it would be more cost effective and in the public interest for them to return to average schedule settlements. The companies state that the revised average schedules more closely simulate cost company settlements since they employ new costing methods and provide settlements for new technologies. In addition, the companies believe that the loss of revenue from the interstate pool would be offset by the reduced administrative costs associated with conducting both interstate and intrastate cost studies and participating in state rate cases.

Interested parties should file comments on this waiver by **June 1, 1993,** and reply comments by **June 16, 1993,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the waiver can be obtained from ITS, Inc. at (202) 857-3800.

We will treat this proceeding as non-restricted for purposes of the Commission's ex parte rules. See generally, 47 C.F.R. §§ 1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-1300.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 89-79

In the Matter of

Amendments of Part 69
of the Commission's Rules
Relating to the Creation of
Access Charge Subelements for
Open Network Architecture

MEMORANDUM OPINION & ORDER ON RECONSIDERATION

Adopted: April 13, 1993; Released: April 14, 1993

By the Commission:

I. INTRODUCTION

1. This is our second order addressing issues raised in the petitions seeking reconsideration of the *Part 69/ONA Order*.[1] In this order, we address issues specific to open network architecture (ONA) services, including the elimination of feature group access.[2] This order modifies the provisions of the *Part 69/ONA Order* and requires Bell Operating Companies (BOCs) to maintain their existing feature groups side by side with unbundled ONA services through June 30, 1994, after which they will be permitted to withdraw the feature groups if they choose. However, it permits BOCs to withdraw their existing feature groups up to one year earlier if they obtain approval of a plan that facilitates IXC service ordering and bill verification in an environment without the feature groups, while eliminating or reducing the adverse selection incentives inherent in retention of the existing feature groups. The Order also denies the other requests for reconsideration that it considers and denies a Sprint motion for a stay of the *Part 69/ONA Order*. This order does not address issues concerning access charge treatment for enhanced service providers (ESPs).

II. BACKGROUND

2. In our *Part 69/ONA Order*, we amended the Commission's Part 69 access charge rules to require the BOCs to modify their access tariffs to include the unbundled optional features and functions (called basic service elements or BSEs) listed in their amended ONA plans. In addition, we decided to regulate BSEs under price cap rules and to require initial BSE prices to satisfy the price cap new services test. We also modified the price cap new services test. Finally, in order to foster an unbundled ONA environment, we concluded that existing BOC feature group access should be eliminated, after a transition period, so that all access customers would select from the same set of unbundled ONA building blocks.[3]

3. We received seven petitions for reconsideration of the *Part 69/ONA Order*. The petitions sought modifications of the price cap new services test, challenged the elimination of feature groups, questioned our decision to regulate the rates for ONA services under price caps, and asked for new access charge treatment for ESPs, among other matters. In July 1992, we responded to portions of the petitions for reconsideration by further revising the price cap new services test.[4] In August, in the interest of updating the record on the remaining unresolved issues from the petitions, we issued a public notice seeking further information relating, *inter alia*, to continuation of existing feature groups and pricing standards for BSEs.[5] This order discusses the status of feature groups after June 1993, pricing standards for BSEs, and certain other ONA issues raised in the petitions for reconsideration.

III. ISSUES

A. Future Availability of Feature Groups

4. *Background.* The *Part 69/ONA Order* required the BOCs to eliminate their feature group access rates at the same time that they placed their unbundled BSAs and BSEs under price cap indices.[6] The *Order* indicated that this would occur in July 1993 if the BOCs filed their ONA tariffs on the November 1, 1991 deadline and they became effective in February 1992.[7] Although an early ONA tariff filing by Ameritech would have led to the elimination of

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[1] Amendment of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture; Policy and Rules Concerning Rates for Dominant Carriers, Report and Order & Order on Further Reconsideration & Supplemental Notice of Proposed Rulemaking, CC Docket Nos. 89-79 and 87-313, 6 FCC Rcd 4524 (1991) (*Part 69/ONA Order*), *modified on recon.*, 7 FCC Rcd 5235 (1992), *pets. for further recon. pending.*

[2] Parties filing petitions for reconsideration, oppositions or replies to those petitions, or additional comments or replies concerning ONA issues from the *Part 69/ONA Order* discussed herein are listed in Appendix A.

[3] The current LEC feature groups offer a basic access arrangement (BSA) bundled with a set of BSEs at a per minute price. The elimination of these feature groups would not deprive IXCs of any currently available access features or functionalities.

[4] Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture; Policy and Rules Concerning Rates for Dominant Carriers, Memorandum Opinion & Order on Second Further Reconsideration, CC Dockets Nos. 89-79 and 87-313, 7 FCC Rcd 5235 (1992), *pets. for further recon. pending.*

[5] Public Notice, 7 FCC Rcd 5309 (1992).

[6] New services are not included under the price cap indices until the first annual price cap tariff filing after the completion of the base year in which the new service becomes effective. Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786, 6825 para. 319 (1990) and Erratum, 5 FCC Rcd 7664 (1990) (*LEC Price Cap Order*), *modified on recon.* 6 FCC Rcd 2637 (1991), *aff'd*, Nat'l Rural Telecomm. Ass'n., et al. v. FCC, No. 91-1300 (D.C. Cir. Mar. 26, 1993), *modified on further recon.* 7 FCC Rcd 5235 (1992), *pets. for further recon. pending.*

[7] 6 FCC Rcd at 4528 n.43.

its feature groups on July 1, 1992, we granted it a waiver to continue offering feature group access until July 1, 1993, like the other BOCs.[8]

5. *Comments.* In their petitions for reconsideration, Sprint, MCI, and GTE strongly oppose the Commission's decision to require the elimination of feature groups. They are supported by all other IXCs and large users who address the issue. The IXCs and large users argue that the elimination of feature groups would impose significant costs while producing no benefits. Sprint estimates the cost of converting its ordering and billing system to accommodate unbundled access elements at a minimum of $16 million, not including the cost of maintaining ordering and billing systems for both bundled and unbundled access elements. Costs that Sprint cites include the cost of modifying computer software to handle the ordering of unbundled elements and the cost of verifying the bills for unbundled services that are not billed on a per minute basis. Sprint also notes that it would incur additional costs for maintaining two separate systems to handle the BOCs and independent LECs who may continue to offer feature groups. IXCs argue that they currently do not have the necessary metering capability to track the use of unbundled BSEs billed on a per call basis. Some IXCs also express concern that an unbundled access system could be manipulated by the BOCs in an unreasonably discriminatory manner, particularly in the absence of feature groups.[9]

6. Ad Hoc also argues that existing feature group prices function as benchmarks, which can be used for comparison with the combined price of a BSA plus the BSEs unbundled from it, and Ad Hoc contends that their elimination would be a great loss.[10] Many IXCs and large users argue that eliminating the feature groups would not produce benefits, and, in support of this, they point to the current low level of demand for unbundled ONA services.[11]

7. NYNEX, Pacific, SW Bell, US West, and SNET also expressly favor Commission action granting the BOCs permission to maintain existing feature groups, although Pacific and SW Bell emphasize that they would oppose a requirement to continue offering them.[12] BellSouth also states its willingness to maintain the feature groups into 1994 or further, but states that if a customer has the ability to accommodate unbundled offerings that customer should not be permitted to utilize both bundled and unbundled offerings.[13] Ameritech and Bell Atlantic formally support the current Commission decision requiring the BOCs to eliminate their feature groups in July 1993.[14]

8. The BOCs, particularly Ameritech and SW Bell, however, note that it is costly for them to maintain the existing feature groups side by side with unbundled ONA elements. Ameritech points out that there is both the cost of maintaining two billing systems and the potential for adverse selection by customers trying to take advantage of different bundled and unbundled rates.[15] WilTel challenges the validity of the latter concern, claiming that the cost of switching from use of the feature groups to unbundled elements is substantial enough to deter any customer from switching to the use of unbundled elements simply to take advantage of a small potential discount.[16]

9. SW Bell also asks the Commission to clarify that if BOCs offer the current feature groups as well as unbundled ONA elements priced under different rate structures, this does not *ipso facto* represent unreasonable discrimination under the Communications Act. SW Bell also explains that permitting IXCs to order feature groups will almost certainly affect demand projections for the unbundled access elements, and thus necessitate some revisions to current BOC access tariffs. In addition, it asks that we make clear that BOCs have no obligation to permit a customer purchasing feature group access for a line to purchase additional new unbundled BSEs for that line. Accordingly, a BOC would be permitted to limit the purchase of feature group access to lines that used only functionalities that were part of existing feature groups.[17] GTE challenges the *Part 69/ONA Order* for failing to comply with standards of administrative law.[18]

10. *Discussion.* We required the BOCs to eliminate feature group access to foster the establishment of a "building blocks" approach to access, which would promote the most efficient and innovative use of the network. We concluded

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[8] Amendment of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, Memorandum Opinion and Order, CC Docket No. 89-79, 7 FCC Rcd 3003 (1992).

[9] Ad Hoc Additional Comments (Add. Comm.) at 13-16; Allnet Opp. at 2-4; AT&T Additional Reply Comments (Add. Reply) passim; CompTel Add. Comm. passim; GSA Opp. at 5-6; GTE Pet. at 4-14; Metromedia Add. Comm. at 2; MCI Pet. at 7-10, 14-20; Sprint Pet. at 5-9; WilTel Add. Comm. at 3-8.

[10] Ad Hoc Add. Comm. at 13-16.

[11] Ad Hoc Add. Comm. at 13; CompTel Opp. at 5-6; MCI Add. Comm. at 2, 5; Sprint Add. Comm. at 4-6; WilTel Add. Comm. at 3-5.

[12] NYNEX Opp. to Tariff No. 57, Dec. 9, 1991, at 22; Pacific Add. Comm. 7-9, Add. Reply at 10; SW Bell Add. Comm. at 5-8; SNET Opp. at 3-4; US West Reply at 3.

[13] BellSouth Add. Comm. at 2-4.

[14] Ameritech Add. Comm. at 4; Bell Atlantic Add. Comm. at 4.

[15] A number of the BOCs have alleged that permitting IXCs to choose between two different rate structures for access -- a pure per minute feature group price and a combination of per minute and per call charges for unbundled ONA services -- could create an adverse selection problem by allowing IXCs to use combinations of bundled access and unbundled offerings. First, an IXC could obtain originating access, automatic number identification (ANI), and called directory number delivery (CDND) by purchasing bundled originating access, which is priced lower than these same unbundled elements because the charges for bundled originating and terminating access are averaged. The IXC could then purchase terminating access on an unbundled basis since the charges would be less than the averaged charge for bundled access. Letter from Anthony Alessi, Ameritech, to Donna Searcy, Mar. 1, 1993. Second, an IXC could purchase unbundled elements for trunks that primarily carried calls of longer than average duration and purchase feature group access for trunks that primarily carried relatively short calls. This would allow the IXC to reduce the per call charges it must pay. By paying for short calls on a per minute basis, it would avoid covering the full per call costs it imposed. Meanwhile, the IXC would not be forced to compensate for that underpayment by overpaying for calls of longer than average duration because it would pay for the latter calls on a per call, not a per minute, basis.

[16] WilTel Add. Comm. at 6-7.

[17] SW Bell Add. Comm. at 5-8.

[18] GTE states that the Commission did not provide a rational connection between the decision to prohibit BOCs from offering feature groups and the facts on which it is based. It also asserts that the order did not consider all responsible alternatives and explain why they were rejected, and failed to provide a reasoned analysis for the policy changes made. GTE Pet. at 4-14.

that the elimination of feature groups would yield this result by requiring all customers to purchase access on the same terms based on the use they made of the network, rather than based on their identity. We also intended this building blocks model to lay the groundwork for more fundamental unbundling of the network.[19]

11. We continue to support these goals and to recognize the importance of ONA unbundling to achieving them.[20] In the current access environment, however, we find that there is little practical benefit to requiring the BOCs to eliminate feature group access given the relatively limited demand for interstate ONA services at this time. We also note that only two parties to this proceeding formally advocate mandatory elimination of feature group access. Our *Part 69/ONA Order* decision not to require BOCs to maintain feature groups alongside unbundled ONA access elements was also based on our concern with the potential adverse selection problem raised by Ameritech, BellSouth, and SW Bell,[21] but no commenters indicated that adverse selection would be a problem if BOCs are not required to offer both options. We therefore modify our requirements to permit, but not require, the BOCs to stop providing access via existing feature groups on July 1, 1994.[22] While there are costs involved if the BOCs retain the feature groups -- the additional cost to the BOCs of maintaining two separate sections of their tariffs and ordering and billing mechanisms that accommodate both bundled and unbundled versions of local switching -- the BOCs will decide to retain existing feature group access after June 30, 1994 only if they believe that these costs are outweighed by the benefits that feature group access provides to their IXC customers.

12. We conclude, however, that mandatory retention of the existing feature groups for more than one additional year is unjustified. The IXCs assert, in general terms, that changing their ordering and billing systems, particularly their bill verification procedures, to accommodate unbundled access elements will be very costly. We are not persuaded that these allegations are correct, however, and warrant requiring the BOCs to maintain feature groups for a longer period. Only Sprint has presented a specific estimate of the costs of making the required changes, and we are not convinced by Sprint's explanations of their cost estimate. We also believe that longer-term mandatory retention of the existing bundled access feature groups would be inconsistent with the general regulatory trend toward increased unbundling of the functionalities of the access network.

13. We do not believe that the potential that some BOCs might engage in discriminatory manipulation of the prices for unbundled access is any greater than, or less manageable than, the potential for any other types of discriminatory pricing. Nor do we believe that the benchmarking function currently performed by the feature group rates is necessary to control the rate levels for unbundled access elements that the average IXC purchases. Therefore, we decline to reverse our *Part 69/ONA Order* by now requiring BOCs to maintain their existing feature groups beyond June 30, 1994. Rather, we will permit BOCs to withdraw their current feature groups on July 1, 1994, if they choose to do so. We will also allow the BOCs to withdraw their present feature groups earlier, if they submit and obtain approval of a plan that facilitates IXC service ordering and bill verification in an environment without the existing feature groups, while eliminating or reducing the adverse selection incentives inherent in retention of the feature groups.[23]

14. We are granting IXCs this limited additional time to adjust to an access environment that may lack existing feature groups for two reasons. First, while the adverse selection problem raised by a number of BOCs has the potential to be quite serious, the record does not indicate that the BOCs are now experiencing substantial harm. Second, while we believe that the IXC allegations concerning the cost of making the necessary modifications to their ordering and billing verification systems is greatly overstated, we do recognize that such changes are neither costless nor administratively simple. By extending this date to July 1, 1994, however, the IXCs will have sufficient time to adjust their ordering, billing, and verification systems to handle the new access elements mandated by our *Transport Order* before they must implement changes related to ONA unbundling.[24] In the process of preparing the *Transport*-related adjustments, they will have ample opportunity to prepare their systems for the additional changes required to handle unbundled feature groups.

15. Absent circumstances that raise other concerns, we will not consider it to be unreasonable discrimination simply because BOCs offer access under both bundled and unbundled rate structures.[25] As a general matter, we believe

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[19] *Part 69/ONA Order*, 6 FCC Rcd at 4528, para. 19.

[20] *See, e.g.*, Expanded Interconnection with Local Telephone Company Facilities, Report and Order and Notice of Proposed Rulemaking, CC Docket No. 91-141, 7 FCC Rcd 7369 (1992) (*Expanded Interconnection Order*), *recon.*, 8 FCC Rcd 127 (1992), *pets. for recon. pending, appeal pending sub nom.* Bell Atlantic Corp. v. FCC, No. 92-1619 (D.C. Cir., filed Nov. 25, 1992); Intelligent Networks, Notice of Inquiry, CC Docket No. 91-346, 6 FCC Rcd 7256 (1991). In petitions filed before our *Expanded Interconnection Order*, MCI and Sprint expressed their dissatisfaction with current levels of unbundling and repeated their earlier requests for further unbundling. MCI Pet. at 10-14; Sprint Pet. at 12. While we expect to consider additional unbundling of access services in other proceedings, we do not believe that further unbundling is warranted based on the current record in this proceeding.

[21] *Part 69/ONA Order*, 6 FCC Rcd at 4527-28.

[22] In light of this decision, we do not believe that it is necessary to respond to GTE's challenges to our prior decision to require the elimination of feature group access.

[23] The BOC plans shall explain, in detail, how they satisfy our standard, and shall include illustrative tariff pages. Interested parties will be permitted an opportunity to comment on the BOC plans. They are to present all issues raised by the plans in those comments rather than raising them, in the first instance, in the tariff review process. After a BOC's plan has been approved, tariffs implementing the approved plan may be filed on 21 days notice, although the effective date may be extended if new issues arise in the tariff review process. Tariffs that do not conform to the approved plan will be subject to rejection.

[24] *See* Transport Rate Structure and Pricing, Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 91-213, 7 FCC Rcd 7006 (1992) (*Transport Order*), *pets. for recon pending*.

[25] In addition, because feature group rates were scheduled to be eliminated when ONA rates were incorporated into price cap indexes, we instructed BOCs to treat this change as a restructure, *i.e.*, to include recast feature group demand in ONA demand. Since, absent plan approval, BOCs will retain feature group access in their 1993 annual filings, there will be no

that LECs retaining the existing bundled feature groups should be allowed to take reasonable steps to reduce the potential for adverse selection or other related problems. We conclude, however, that the details of BellSouth's request that it not be required to permit a customer to utilize both bundled and unbundled offerings, and SW Bell's request that it not be required to permit customers to purchase additional new unbundled BSEs on the lines for which they purchase feature group access are best addressed in the tariff review process.

B. Regulating ONA Services Under Price Caps

16. *Background.* In the *Part 69/ONA Order,* we found that regulating ONA services under price caps could provide the same public interest benefits that it does for other services. We also concluded that the flagging rules we adopted could provide an adequate check against potential BOC price discrimination.[26] Finally, we held that we had provided adequate notice to commenters on this issue.

17. *Petitions and Comments.* The DC PSC asks us to reconsider our decision to regulate ONA services under price caps. It argues that the price cap rules are inadequate because they do not prevent LECs from discriminating among the prices of those ONA services subject to a single pricing band. The DC PSC argues that our flagging system is unsatisfactory because it relies solely on the willingness and ability of private parties and the Commission staff to undertake the arduous task of scrutinizing the flagged BOC tariff filings.[27] BellSouth, meanwhile, asserts that we did not invite or consider public comments related to the issues of if and how ONA services should be treated under price caps, and thus our decision to treat these services under price caps was unlawful.[28] In response, MCI points out that two of our Notices of Proposed Rulemaking (NPRMs) proposed to apply price caps to ONA services, and the DC PSC observes that many comments were filed on that issue in this proceeding.[29]

18. *Decision.* We decline to modify our decision to regulate the charges for ONA service under price caps. In the *Part 69/ONA Order,* we considered all of the points that the DC PSC raises and rejected them. As just noted, the *Part 69/ONA Order* acknowledged the potential danger of discrimination, but concluded that the flagging rules it adopted would provide an adequate check against potential BOC price discrimination while permitting price cap regulations to provide valuable benefits.[30] While enforcement of our flagging rules requires us to examine the information disclosed by the BOCs, we do not find that this compels an unreasonable expenditure of resources. In fact, we believe that evaluating the BOC information will require far fewer resources than would be necessary to employ the cost-based rate-of-return regulation model that the DC PSC asks us to use. Accordingly, we deny its request here. With respect to BellSouth's allegation, we believe that we satisfied APA notice requirements by raising the issue of regulating ONA services under price caps in two NPRMs. The measures that we adopted are a logical outgrowth of our tentative conclusion that price caps is compatible with ONA.

C. Miscellaneous Issues

19. *FCC Authority.* Pacific argues that the FCC has exceeded its authority in this proceeding by requiring the federal tariffing of all BSEs that are technically compatible with interstate BSAs. It claims that the Commission must examine each BSE to determine whether it is an interstate service, and whether it should be tariffed immediately.[31] Other parties respond, however, that this is the same argument against FCC authority to require the federal tariffing of ONA elements that we rejected in the *BOC ONA Reconsideration Order.* They note that in this proceeding, we had only ordered the unbundling of interstate feature groups, and that dual tariffing is consistent with the Supreme Court's ruling in the *Louisiana* case.[32]

20. We find that we have not exceeded our authority because we are not requiring Pacific to file federal tariffs for any intrastate services. We are only requiring Pacific to file tariffs for BSEs that can be used as part of interstate common carrier communications. Since interstate communication is clearly within our authority, we believe that this action is also well within our authority.[33] We also reject Pacific's request that we examine each one of its BSEs before requiring them to be federally tariffed immediately. As we have previously stated in this proceeding, the only services that Pacific is required to tariff are those that it found to be economically practical to include in its Amended ONA Plans and that are technically feasible to offer on an interstate basis.[34] If Pacific believes that a particular BSE is not technically feasible on an interstate basis, it should file a waiver petition. This is the same procedure that Pacific has already followed for other BSEs that it has sought to withhold from federal tariffs.[35]

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restructure of rates. Therefore, the demand associated with feature group elements and unbundled ONA elements in the computation of the indexes should be actual base year demand.

[26] *Part 69/ONA Order,* at 4528, para. 23 and at 4533-34, paras. 52-53.

[27] DC Pet. at 2-5.

[28] BellSouth Pet. at 2-5.

[29] MCI Opp. at 3-8; DC Opp. at 5.

[30] *Part 69/ONA Order,* at 4528, para. 23 and at 4533-34, paras. 52-53.

[31] Pacific Pet. at 2-10.

[32] AT&T Opp. at 4-8; CONAP/Ad Hoc Opp. at 4-7, and citing *Louisiana Public Service Commission v. FCC,* 476 U.S. 355 (1986); MCI Opp. at 29-30.

[33] *See* Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2, Phase I, Memorandum Opinion and Order, 4 FCC Rcd 1, 143-45 (1988) (*BOC ONA Order), recon.,* 5 FCC Rcd 3084, 3088-90 (1990) (*BOC ONA Reconsideration Order),* 5 FCC Rcd 3103 (1990) (*BOC ONA Amendment Order), Erratum,* 5 FCC Rcd 4045 (1990), *pets. for rev. pending,* California v. FCC, No. 90-70336 (9th Cir. filed July 5, 1990), *recon.,* 8 FCC Rcd 97 (1993) *(BOC ONA Amendment Reconsideration Order);* 6 FCC Rcd 7646 (1991) (*BOC ONA Further Amendment Order), pet. for rev. pending,* MCI Telecommunications Corp. v. FCC, No. 92-70189 (9th Cir. filed Feb. 19, 1992); DA 93-362, released Mar. 29, 1993, (*BOC Second Further Amendment Order).*

[34] *See* Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, Memorandum Opinion and Order, CC Docket Nos. 89-79 and 88-2, 8 FCC Rcd 448 (1993).

[35] *See* Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, Memorandum Opinion and Order, CC Docket Nos. 89-79 and 88-2, 7 FCC Rcd 811, 815-816 (Com. Car. Bur. 1992), *appl. for rev. denied,* 8 FCC Rcd 448 (1993), *reconsideration,* 7 FCC Rcd 7241, 7242-7244 (Com. Car. Bur. 1992).

21. *A Comprehensive Proceeding.* Several parties argue that the danger of inconsistency among the many proceedings having an effect on interstate access (*e.g.,* CC Docket Nos. 78-72, 89-79, 91-213, and 91-141) is so great that the Commission must consider the common issues in a single comprehensive proceeding.[36] CONAP/Ad Hoc responds that it would be sufficient if the agency coordinates the related proceedings.[37] We agree that we are able to avoid inconsistent results by coordinating these proceedings, and we find that handling them separately, as we are currently doing, is much more manageable. Therefore, we decline to create a single comprehensive proceeding at this time for resolution of these issues.

22. *Jurisdictional Usage.* In the *Part 69/ONA Order* we found that when actual BSE measurement is impractical, LECs should apply the jurisdictional usage of the underlying BSA to BSEs associated with that BSA. CompuServe repeats its earlier contention that the use of the entry/exit surrogate (EES) to measure the percentage of interstate usage (PIU) for ONA services is unreasonable.[38] California requests that we institute a comprehensive proceeding to focus exclusively on the issue of jurisdictional traffic measurement, claiming that our order is vague and overbroad. California argues that our order preempts state tariffing and that this issue should be referred to a Joint Board.[39] We conclude that there is no need to reconsider the use of the EES as a surrogate for measuring the PIU for ONA services. Upon recommendation of a Joint Board, we adopted the EES as a surrogate for measuring the PIU for feature group A and B.[40] The EES has worked as a surrogate, and no party has demonstrated why it cannot work equally as well for ONA services. In addition, given that no party has offered an alternative mechanism that would work better or any new arguments that would convince us to reverse our original decision, we decline to modify this portion of our decision. California has also failed to persuade us of the need for further proceedings before a Joint Board since we are essentially retaining the EES treatment applicable to the feature groups where there are similar measurement problems for unbundled ONA access components.

23. *State Evaluation of Federal Tariffs.* The DC PSC also asks us to consider permitting state commissions to approve interstate ONA rates if they agree to use the relevant FCC standards to evaluate those rates for both state and federal tariffs. DC argues that this would reduce the opportunity for ESPs to engage in tariff shopping and states that it offers the proposal in an effort to promote federal and state cooperation.[41] While we support efforts to foster federal-state cooperation concerning ONA implementation, we decline to delegate tariff review authority over interstate tariffs to the state commissions. This proposal raises serious legal questions, and even if we were authorized to delegate our tariff review authority to state commissions, we would be reluctant to alter the historic balance between federal and state regulatory authority. Accordingly, we will continue to evaluate these tariffs ourselves.

D. Sprint Motion for Stay

24. On September 30, 1991, Sprint filed a motion for a stay of the rules we adopted in the *Part 69/ONA Order.* Sprint opposes many of the decisions we reached in the order, but argues particularly against the elimination of feature group access. It asserts that eliminating feature groups would be a bad policy decision causing irreparable harm to Sprint and other IXCs. Sprint requests that we grant this stay pending Commission action upon the petitions for reconsideration and judicial review of the underlying orders establishing the Open Network Architecture (ONA) regime.[42]

25. We decline to stay our action in the *Part 69/ONA* proceeding since Sprint has not shown that its request meets the four criteria for the grant of a stay.[43] First, Sprint does not show that it is likely to prevail on the merits since we reject its claim that we did not provide adequate notice.[44] Sprint's mere suggestion of the possibility that court appeals of the *Part 69/ONA Order* and the orders establishing ONA will lead to a reversal does not satisfy this requirement. Second, we emphasize that Sprint has not shown that withdrawal of feature groups, as provided for in this order, will cause it irreparable damage.[45] Third, we note that the BOCs could be harmed by a stay that prevented them, for an extended period of time, from withdrawing their existing feature groups if they found the feature groups too costly to maintain.[46] Finally, we believe that our current decision requiring BOCs to maintain their feature groups though June 30, 1994, unless they obtain approval of an alternative plan, should alleviate Sprint's concerns, and is in the public interest.

IV. CONCLUSION AND ORDERING CLAUSES

26. This order modifies the provisions of the *Part 69/ONA Order* and requires the BOCs to maintain their existing feature groups side by side with unbundled ONA services through June 30, 1994, after which they will be permitted to withdraw them. In addition, it permits a BOC

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[36] GTE Pet. at 21-24; Pacific Pet. at 10-13; CompTel Opp. at 10-11.

[37] CONAP/Ad Hoc Opp. at 16-17.

[38] CompuServe Pet. at 8.

[39] Cal. Opp. at 2, 3, 5.

[40] Determination of Interstate and Intrastate Usage of Feature Group A and Feature Group B Access Service, Memorandum Opinion and Order, CC Docket No. 85-124, 4 FCC Rcd 8448 (1989).

[41] DC Pet. at 5-6.

[42] Our decision to continue feature groups for an additional year, absent approval of a substitute plan, should ease at least some of Sprint's concerns.

[43] A petitioner for a stay must show that: 1) there is a likelihood that it will prevail on the merits; 2) it will be irreparably injured in the absence of a stay; 3) others are unlikely to be harmed by a stay; and 4) a stay would be in the public interest. Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921 (D.C. Cir. 1958), as modified by Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977).

[44] We raised the prospect of eliminating feature groups in Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, Notice of Proposed Rulemaking, CC Docket No. 89-79, 4 FCC Rcd 3983, 3991 n.9 (1989) (*Part 69/ONA NPRM).* Furthermore, we solicited additional comments on this issue in a public notice in August 1992. Public Notice, 7 FCC Rcd 5309 (1992).

[45] *See,* paras. 12-14, *supra.*

[46] *See* paras. 8 & 11 *supra.*

to withdraw its present feature groups up to one year earlier if it receives approval of a plan that facilitates IXC service ordering and bill verification in an environment without the feature groups, while eliminating or reducing the adverse selection incentives inherent in retention of the existing feature groups. The order denies all other requests for reconsideration of the *Part 69/ONA Order* that it considers.

27. Accordingly, IT IS ORDERED that pursuant to Sections 1, 4(i) and (j), 201-205, 303(r), and 405 of the Communications Act, 47 U.S.C. §§ 151, 154(i) and (j), 201-205, 303(r), and 405, the petitions for reconsideration of the *Part 69/ONA Order* are GRANTED to the extent described herein and are otherwise DENIED with respect to the issues considered.

28. IT IS FURTHER ORDERED that the Bell Operating Companies SHALL FILE tariff revisions to reinstate the existing feature groups as specified above. These revisions shall be filed no later than May 3, 1993, with a scheduled effective date of July 1, 1993. Special Permission no. 93-315 is assigned and Sections 61.58 and 61.59, 47 C.F.R. §§ 61.58, 61.59, of the Commission's Rules ARE WAIVED for this purpose.

29. IT IS FURTHER ORDERED that Sprint's motion for stay, filed on September 30, 1991, is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

LIST OF COMMENTERS

1. Petitions for Reconsideration (Pet.)

1. BellSouth Telephone Companies. South Central Bell Telephone Company and Southern Bell Telephone and Telegraph Company (BellSouth)
2. CompuServe
3. PSC of the District of Columbia (DC PSC)
4. GTE Service Company and its affiliated domestic telephone operating companies (GTE)
5. MCI Telecommunications Corp. (MCI)
6. Pacific Bell (Pacific)
7. US Sprint Communications Company (Sprint)

2. Oppositions to Pets. for Reconsideration (Opp.)

1. Allnet Communications Services, Inc. (Allnet)
2. American Telephone & Telegraph Company (AT&T)
3. People of the State of California and the PUC of the State of California (Cal.)
4. Coalition of Open Network Architecture Parties and Ad Hoc Telecommunications Users Committee (CONAP/Ad Hoc)
5. Competitive Telecommunications Association (CompTel)
6. General Services Administration (GSA)
7. MCI
8. Southern New England Telephone Company (SNET)

3. Replies to Opps. to Pets. for Reconsideration (Reply)

1. US West Communications (US West)

4. Additional Comments (Add. Comm.)

1. Ad Hoc
2. Ameritech Operating Companies (Ameritech)
3. Bell Atlantic
4. BellSouth
5. CompTel
6. Metromedia Communications Corp. (Metromedia)
7. Pacific
8. Southwestern Bell Telephone Company (SW Bell)
9. Williams Telecommunications Group (WilTel)

5. Replies to Additional Comments (Add. Reply)

1. AT&T
2. Pacific

6. Comments on Sprint's Motion for Stay (Stay Comm.)

1. Allnet
2. Ameritech
3. Bell Atlantic
4. SW Bell

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Power Drive, Inc. NAL/Acct. No. 315HF0016
1912 W. 4th Street
Tempe, AZ 85281

NOTICE OF APPARENT LIABILITY

Adopted: April 23, 1993; Released: April 29, 1993

By the Field Operations Bureau:

I. INTRODUCTION

1. This is a Notice of Apparent Liability for Monetary Forfeiture (NAL) issued pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b)(the Act), to Power Drive, Inc., (Power Drive) for willful violation of Section 2.803 of the Commission's Rules, 47 C.F.R. § 2.803, by marketing Class B computer device peripherals (external computer storage subsystems) which have no proper FCC authorization, and which exceed the radiated emissions limits specified in Section § 15.109(a).

2. The appropriate amount of forfeiture for this violation is $7,000.

II. BACKGROUND

3. On February 25, 1992, the Commission received a complaint, with supporting documentation, that Power Drive, through its distributor, MacWarehouse, was marketing equipment with FCC ID number H8KPDHH which varied from the equipment which was actually authorized by the Commission. Based on the complaint and documentation, and pursuant to Sections 2.945 and 2.946 of the regulations, the Commission's Columbia, Md., Office wrote to Power Drive on March 27, 1992, requesting samples of two devices, and the cables used by these devices, for testing. Power Drive submitted a sample of one of the devices (SY555), and the cable used for this device (SCSI cable). The FCC's Columbia Office received the samples on May 30, 1992. As to the other device requested (MC1528), Power Drive responded that this system, which was being marketed under a different FCC ID--H9DT-100--did not belong to their company.

4. In September 1992, the Commission's laboratory conducted compliance tests on the SY555 sample submitted by Power Drive, and found that it exceeded the radiated emissions limits under Section 15.109(a), to which it is subject. Further, the FCC grant issued on June 13, 1990, with FCC ID H8KPDHH, covered a non-removable SCSI hard drive; the SY555 device submitted for testing and labeled with FCC ID H8KPDHH included a removable cartridge SCSI hard drive. The equipment, therefore, was found to be unauthorized.

III. DISCUSSION

5. The record included advertising and marketing materials indicating that Power Drive, Inc., a wholly-owned subsidiary of Hard Drive, Inc., was selling computer equipment and peripherals, labeled with FCC ID H8KPDHH, which was not authorized by the Commission, as determined by the September 1992 tests conducted by the Commission's laboratory. The equipment sold by Power Drive included removable hard drive cartridges; the grant for H8KPDHH only covered a non-removable hard drive. Power Drive's advertising and sale of equipment model number SY555, therefore, violated the requirements of Section 2.803 of the Rules, 47 C.F.R.§§ 2.803.

6. Marketing of an unintentional radiator (such as a Class B computing device) which fails to meet the radiated emissions limits is a violation of Section 15.109(a) of the Rules. Tests conducted at the Commission's laboratory on the sample equipment submitted by Power Drive indicate that emissions from the equipment exceeded the radiated emissions limits by +16 dB.

7. The record also establishes that the violation was willful, not the result of some unintended action. Section 312(f)(1) of the Communications Act, which also applies to Section 503(b) (*see Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991)), provides: "The term 'willful', when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or by a treaty ratified by the United States." Pursuant to the Commission's *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *modified in part on recon.*, 7 FCC Rcd 5339 (1992), *petition for review pending sub. nom. USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992) and Section 503(b)(2) of the Act, we have determined that the appropriate amount for this violation is $7,000. No further adjustments appear warranted.

IV. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act and Section 1.80 of the Commission's Rules, 47 C.F.R. § 1.80, that Power Drive, Inc., IS APPARENTLY LIABLE FOR A MONETARY FORFEITURE in the amount of $7,000 for violating Sections 2.803 and 15.109(a) of the Commission's Rules.

9. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's Rules, 47 C.F.R. § 1.80(f)(3), that Power Drive, Inc. shall, within thirty (30) days of release of this Notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. Claims of inability to pay should be supported by tax returns or other financial statements for the most recent 3 years. Payment should be made by check or money order payable to the Federal Communications Commission, attention NAL Acct. No. 315HF0016, and mailed to the following address:

Federal Communications Commission
P.O. Box 73482
Chicago, Illinois 60673-7482

Send written responses regarding why the forfeiture should be reduced or not imposed to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division, AC/1500E3
1919 M Street, N.W.
Washington, DC 20554
ATTN: NAL Response

10. IT IS FURTHER ORDERED that this Notice of Apparent Liability for Monetary Forfeiture shall be sent by certified mail to Power Drive Inc., 1912 W. 4th Street, Tempe, AZ.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

National Exchange
Carrier Association, Inc.

Proposed Amendment to the
Interstate Average Schedules

MEMORANDUM OPINION AND ORDER

Adopted: April 28, 1993; Released: April 30, 1993

By the Chief, Common Carrier Bureau:

1. On December 31, 1992, the National Exchange Carrier Association, Inc. ("NECA") filed a proposed amendment to the average schedule formulas to compensate average schedule companies for providing 800 database service after April 30, 1993.[1] NECA states that the proposed settlement is, for all practical purposes, a "flow through" of payments that average schedule companies must make to providers of 800 data base service for 800 data base queries.[2] No one opposed NECA's proposed amendment.

2. We find that the proposed amendment is reasonable, and will provide adequate compensation to average schedule companies for the charges that are associated with 800 data base queries.

3. ACCORDINGLY, IT IS ORDERED THAT NECA's proposed average schedule settlement for 800 data base queries IS APPROVED with an effective date of May 1, 1993.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

[1] *See generally* Provision of Access for 800 Service, 6 FCC Rcd 5241 (1991); *recon.* 6 FCC Rcd 5421 (1991); *further recon.* 8 FCC Rcd 1038 (1993). All average schedule companies, as independent telephone companies, are required to provide 800 data base access after April 30, 1993. *See* Provision of Access for 800 Service, 7 FCC Rcd 8616 (1992), 8 FCC Rcd 1040 (1993).

[2] NECA Proposed Amendment (Dec. 31, 1992) at 2; NECA Proposed Modifications to the Average Schedules (Dec. 31, 1992) at iv.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-503

In re Applications of

ON THE BEACH BROADCASTING — File No. BPH-850712UP

PORTOLA BROADCASTING CORPORATION — File No. BPH-850712VJ

For a Construction Permit
for a New FM Station on
Channel 285A at
San Clemente, California

MEMORANDUM OPINION AND ORDER

Adopted: April 29, 1993; Released: May 10, 1993

By the Commission: Commissioner Duggan issuing a separate statement.

1. This case involves the applications of On the Beach Broadcasting (Beach) and Portola Broadcasting Corporation (Portola) for a construction permit for a new FM broadcast station to operate on Channel 285A (104.9 MHz) at San Clemente, California. Beach and Portola propose to operate their stations from a common antenna site known as Clemente Peak. Station KKGO(FM), Los Angeles, California, a Class B station licensed to Mt. Wilson FM Broadcasters, Inc. (Mt. Wilson), operates on first adjacent Channel 286 from a site that is located 61.35 miles from Clemente Peak. Section 73.207 of the Commission's Rules, 47 C.F.R. §73.207, requires a distance separation of 65 miles between a Class A station and a Class B station operating on a first adjacent channel.[1] Accordingly, the proposals of Beach and Portola are short-spaced to station KKGO(FM) by 3.65 miles. The applicants concede that their proposals are inconsistent with Section 73.207, and each has requested a waiver of the rule.

2. In an Initial Decision released September 5, 1991, Administrative Law Judge (ALJ) Joseph P. Gonzalez concluded that each of the applicants failed to justify its request for a waiver of Section 73.207, that each applicant was thus unqualified, and that each application had to be denied. *On the Beach Broadcasting*, 6 FCC Rcd 5221. The Review Board affirmed the denial of Beach's and Portola's applications. *On the Beach Broadcasting*, 7 FCC Rcd 1346, released February 13, 1992.[2] We agree with the Board's disposition of this matter and affirm its decision.[3]

I. BACKGROUND

3. In its decision, the Review Board set out the background of this case in some detail, *see* 7 FCC Rcd 1346-1349 ¶ ¶ 2-7, and we need not repeat that here. To summarize, Channel 285A was allotted to San Clemente in a hotly contested rule making proceeding. *See Report and Order in MM Docket No. 84-442*, 50 Fed. Reg. 8226, published March 1, 1985, *reconsideration denied*, Mimeo No. 6281, released August 13, 1986, *review denied*, 2 FCC Rcd 2514 (1987), *reconsideration denied*, 3 FCC Rcd 6728 (1988). The Report and Order specified a site restriction of 8.9 km (5.5 miles) southeast of San Clemente to protect the spacing requirements to FM stations in San Diego and

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[1] Section 73.207 prescribes minimum distances between FM stations according to the frequency utilized and class of facility. These minimum separation requirements are intended to prevent interference between FM stations. *See North Texas Media, Inc. v. FCC*, 778 F.2d 28, 30-31 (D.C. Cir. 1985), *aff'g North Texas Media, Inc.*, FCC 84-456, released October 5, 1984.

[2] The application of a third applicant, James Harden and Claudia Harden, A Partnership, was dismissed by the Board for failure to prosecute, 7 FCC Rcd at 1352 ¶ 22, and its application is not discussed further herein.

[3] Now before the Commission are: (a) an application for review filed March 13, 1992, by Portola; (b) an application for review filed March 23, 1992, by Beach; (c) the Mass Media Bureau's (Bureau's) consolidated comments, filed March 30, 1992; (d) Beach's opposition to Portola's application for review, filed March 30, 1992; (e) the consolidated opposition of Mt. Wilson to applications for review, filed March 30, 1992; (f) a petition for leave to amend and amendment, filed June 25, 1992, by Beach; (g) a petition to reopen the record, filed June 25, 1992, by Beach; (h) the Bureau's consolidated comments on petition for leave to amend and petition to reopen the record, filed July 7, 1992; (i) opposition of Mt. Wilson to petition for leave to amend, filed July 10, 1992; (j) opposition of Mt. Wilson to petition to reopen the record, filed July 10, 1992; (k) petition of Mt. Wilson for leave to file supplement to opposition to petition for leave to amend, filed July 17, 1992; (l) petition of Mt. Wilson for leave to file supplement to opposition to petition to reopen the record, filed July 17, 1992; (m) supplement to oppositions of Mt. Wilson to petitions to reopen record and for leave to amend; (n) petition of Beach for leave to file consolidated reply and comments, filed July 17, 1992; (o) consolidated reply and comments of Beach, filed July 17, 1992; (p) petition of Mt. Wilson for leave to file additional pleading, filed July 21, 1992; (q) supplement of Mt. Wilson to opposition to petition for leave to amend, filed July 21, 1992; (r) motion to strike supplement to opposition to petition for leave to amend, filed July 24, 1992, by Beach; (s) petition for leave to file supplement to amendment, filed July 28, 1992, by Beach; (t) supplement to petition for leave to amend and amendment, filed July 28, 1992, by Beach; (u) petition for leave to file second supplement to amendment, filed August 13, 1992, by Beach; (v) second supplement to petition for leave to amend and amendment, filed August 13, 1992, by Beach; (w) letter, dated August 13, 1992, from M.E. Lowe, Colonel, U.S. Marine Corps, Chief of Staff, Camp Pendleton, California, to the Secretary of the Commission; (x) opposition of Mt. Wilson to Beach's petition for leave to file second supplement to amendment, filed August 24, 1992; (y) Bureau's opposition to petition for leave to amend, filed September 22, 1992; and (z) Beach's request to withdraw petition for leave to amend, filed April 2, 1993. As Beach has abandoned its requests for acceptance of its tendered amendment and consequent reopening of the record, we will dismiss all of the pleadings listed above that argue for or against those requests and will also dismiss the associated motions to file or strike.

Palm Springs, California. This restriction limited fully-spaced sites to the confines of the Marine Corps base at Camp Pendleton, which is located south of the city limits of San Clemente.

4. Mt. Wilson objected to the allotment of Channel 285A to San Clemente. It argued that, because of objections by Camp officials, Camp property would not be available for a proposed transmitter site. The Mass Media Bureau's Report and Order allotted the channel to San Clemente nonetheless on the basis of a disputed statement by an officer at Camp Pendleton that the authorities might consider locating a transmitter within the boundaries of the Camp. By the time the case reached the Commission on applications for review, it was clear that no site at Camp Pendleton would be available. The Commission nevertheless upheld the allotment on the ground that it was properly based on a factual determination that was reasonable at the time and because it would be inequitable to delete the allotment without considering pending applications that specified short-spaced sites outside of Camp Pendleton and the associated requests for waiver of the FM spacing rule. 3 FCC Rcd at 6728-29. Mt. Wilson and another radio station that had objected to the channel allotment filed petitions for review challenging the allotment with the United States Court of Appeals for the District of Columbia Circuit. The Court of Appeals held that the appeals were "not ripe for review at this time" because the Commission had not yet authorized anyone to operate a station on the channel. *Mt. Wilson FM Broadcasters, Inc. v. FCC*, 884 F.2d 1462, 1466 (D.C. Cir. 1989). The Court stated that at the upcoming hearing on the applications for the allotment, "all of the issues which concern . . . [the] petitioners and potential applicants will be resolved by the Commission." *Id.*

5. A few months later, the applications of Beach, Portola and seven others for the San Clemente allotment were designated for hearing. *Hearing Designation Order (HDO)*, 4 FCC Rcd 8399 (1989). The *HDO* specified an issue to determine whether the proposals of the applicants are consistent with the minimum distance separation requirements of Section 73.207, and, if not, whether circumstances exist that warrant waivers of the spacing rule. *Id.* at 8402 ¶ 21. Mt. Wilson was made a party to the proceeding with respect to this issue. *Id.* at ¶ 28.

II. INITIAL DECISION AND REVIEW BOARD DECISION

6. The ALJ concluded that a waiver of Section 73.207 was not warranted for either Portola or Beach. The ALJ rejected Portola's waiver request because "Portola failed to present any evidence indicating that it sought to locate a fully-spaced site or a site less short-spaced than its present site." 6 FCC Rcd at 5222 ¶ 12. Although the ALJ found that Beach made a "good faith effort . . . to acquire fully-spaced or less short-spaced" sites, *id.* at 5222 ¶ 13, he rejected Beach's waiver request because Beach failed to show that the public interest benefits flowing from a grant of the waiver would be sufficiently compelling to offset the magnitude of the spacing deficiency proposed. *Id.* Utilizing the computation method most favorable to the applicants, the ALJ found that the short-spacing proposed here would be responsible for causing interference to 3.4% of the total population, or 330,551 persons, within the protected contour of station KKGO(FM), and 3.8% or 430 sq. km. of the area served by KKGO(FM), and that KKGO(FM) would, in turn, cause interference to 26.4% of the population, or 42,147 persons, and 14% of the area or 81 sq. km. served by the proposed short-spaced San Clemente stations. 6 FCC Rcd at 5222 ¶ 11.[4] The ALJ concluded that the amount of interference involved would be "patently unacceptable." Id. at 5222 ¶ 13.[5] The ALJ further concluded that "the applicants have otherwise failed to demonstrate any public interest factors to compensate for this significant degree of interference." *Id.*

7. The Review Board agreed with the ALJ that the applicants failed to justify their requests for a waiver of Section 73.207. 7 FCC Rcd 1346. First, the Board held that Portola made no independent search for a fully-spaced site or a lesser short-spaced site, and that its failure to do so was fatal to its request for a waiver of the rule. *Id.* at 1351 ¶ 18. Second, the Board concluded that although Beach made a sufficient showing at the hearing that no suitable fully-spaced site or less short-spaced site was available, Beach did not demonstrate that the public interest benefits that would result from its proposal were sufficiently compelling to offset the magnitude of the potential interference caused to, and received from, station KKGO(FM). *Id.* at 1351-52 ¶ ¶ 18-21. The Board considered and weighed all of the alleged public interest benefits advanced by the applicants in support of a waiver[6] and ultimately determined that these benefits were not sufficient to overcome

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[4] Pursuant to the Commission's decision in *Tri-Valley Broadcasting Co.*, 4 FCC Rcd 4711 (1989), the parties adduced evidence at the hearing depicting the amount of interference that would be caused to KKGO(FM) by a San Clemente station operating on Channel 285A from Clemente Peak and by KKGO(FM) to a San Clemente station. In *Tri-Valley*, the Commission held that:

> [I]n those instances where an applicant seeking waiver of the distance separation requirement has made the necessary threshold showing that no suitable fully spaced or less short-spaced sites are available, . . . predictions of the protected and interfering contours of the affected stations . . . provide some measure of the extent of objectionable interference potentially involved and, thus, are useful in making our determination as to whether the public interest benefits are sufficiently compelling to offset the magnitude of the potential interference.

Id. at 4712 ¶ 9.

[5] Station KKGO(FM) is a grandfathered superpower station operating with a height and power combination which exceeds the maximum height and power combination for Class B stations. *See* 7 FCC Rcd 1346, 1352 n.1. In considering the amount of interference that would be caused by KKGO(FM), the ALJ assumed that the Los Angeles station would be operating with only maximum Class B height and power rather than its actual superstation facilities. In reality, therefore, KKGO(FM) would unquestionably cause more interference to either of the short-spaced San Clemente proposals than is predicted on paper.

[6] These public interest factors include: the presence of a nuclear power plant (allegedly justifying a second San Clemente radio station for emergency broadcasts in the event of a disaster at the power plant); San Clemente's population increase; the purported status of Clemente Peak as a *de facto* antenna farm; the alleged equities of the applicants; the absence of any alternative channels; the provision of a second aural service to the community; the amount of short-spacing involved; and the ownership of Portola by a member of a minority group. *See* 7 FCC Rcd at 1352 ¶ 21 & 1354-1355 nn. 5-10.

the "patently unacceptable" interference that would be caused, "especially" in light of the facts that "one facility [is] already licensed to San Clemente and [there are] more than 30 other radio signals available in the community (from nearby cities)." *Id.* at 1352 ¶ 21 (footnote omitted).

III. DISCUSSION

A. Portola's Directional Antenna Amendment

8. In its application for review, Portola argues that the Board erred when it upheld the ALJ's decision to reject an amendment filed by Portola on January 8, 1990, which Portola claims would have made the need for a short-spacing waiver unnecessary. Portola's amendment proposed the use of a directional antenna. The amendment was rejected because of "Portola's failure to comply with the provisions of 47 C.F.R. §73.215(b)(2)(ii) in calculating predicted contours," thus "render[ing] its amendment technically flawed and incapable of grant." 7 FCC Rcd at 1353 n.3; *see Memorandum Opinion and Order,* FCC 90M-846, released April 18, 1990.

9. In 1989, the Commission adopted new rules permitting an applicant for a commercial FM radio station to request the authorization of a transmitter site that would be short-spaced to the facilities of co-channel or adjacent channel stations, provided the service of the existing stations is protected from interference. *Report and Order, Amendment of Part 73 of the Commission's Rules to Permit Short-Spaced FM Station Assignments by Using Directional Antennas,* 4 FCC Rcd 1681 (1989). The Commission stated that the necessary protection could be afforded by, among other things, utilizing a directional antenna. *Id.* at 1685-86.

10. Portola sought to take advantage of the new rules when it filed a petition for leave to amend on January 8, 1990. Portola's amendment was rejected by the ALJ because Portola failed to provide the requisite contour protection to station KKGO(FM). *Memorandum Opinion and Order, supra,* FCC 90M-846. Portola's argument essentially amounts to a contention that acceptance of its amendment depends on which "methodology" is used to calculate KKGO(FM)'s protected contour, Portola's method or the method set forth in Section 73.215 of the Commission's Rules. But the new rule gives no support for Portola's method. Rather, Section 73.215(b)(2)(ii) of the Commission's Rules provides that, in order to take advantage of directionalization, contours have to be based on the "maximum ERP [effective radiated power] for the applicable station class." Because station KKGO(FM) is a Class B station, and the maximum ERP for a Class B station is 50 kW, an ERP of 50 kW must be employed in calculating KKGO(FM)'s protected contour. When an ERP of 50 kW is employed, Portola's proposed directional antenna does not provide the requisite contour protection to KKGO(FM). While Portola alleges that its methodology for calculating KKGO(FM)'s protected contour is "supported by more than a quarter century of precedent," *Application for Review,* p. 2, Portola ignores the plain language of the rule.[7] Section 73.215(b)(2)(ii) does not contemplate that a superpower station's ERP will be downgraded to an equivalent level. It simply requires the use of maximum ERP for the station class. It is undisputed that Portola did not calculate KKGO(FM)'s protected contour based on an ERP of 50 kW. Therefore, Portola's amendment was technically flawed and properly rejected. 7 FCC Rcd at 1353 n.3; *Memorandum Opinion and Order, supra,* FCC 90M-846.

B. The Applicants' Waiver Showings

11. When an applicant for an FM station requests a waiver of the minimum distance separation rule, it must show that: (a) there are no fully spaced sites available; (b) the proposed site is the least short-spaced site available; and (c) the public interest benefits flowing from a grant of the waiver request would be sufficiently compelling to offset the magnitude of the spacing deficiency proposed. *See Megamedia,* 67 FCC 2d 1527, 1528 (1978); *Townsend Broadcasting Corp.,* 62 FCC 2d 511, 512 (1976). In deciding whether to waive Section 73.207, the Commission considers both the public interest benefits and public interest detriments -- including any potential objectionable interference to *and* from an existing FM station or stations -- in light of all the information presented by the applicants in their waiver requests and by any interested party. *See Tri-Valley Broadcasting Co.,* 4 FCC Rcd at 4712 ¶ 9. *See also Concurring Statement of Board Member Greene,* 7 FCC Rcd at 1356.

12. In this case, the Board found that the record appears to support Beach's claim that it had satisfied the first and second parts of the three-part test,[8] but held that it failed to sustain its burden of proof under the third part. 7 FCC Rcd at 1351 ¶ 18, 1352 ¶ 20. On the other hand, the Board found that Portola failed to make the requisite showing under the first two parts of the test. Therefore, it was unnecessary to determine whether Portola met its burden under the third part of the test. *Id.* at 1351 ¶ 18.[9]

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[7] The twenty-five years of precedent relied upon by Portola was effectively overruled by the change in Section 73.215 in 1989, and any disagreement that Portola had with that action should have been raised in connection with that rule making proceeding.

[8] The Board noted, however, that the applicants' joint engineering consultant had conceded that "a fully-spaced tall tower could, in fact, be erected to provide service to San Clemente," *id.* at 1351 ¶ 19, and stated that this concession "does not assist the applicants in meeting their stringent waiver burdens," *id.* at 1352 ¶ 19.

[9] Unlike Portola, Beach appears to have made a good faith effort to meet the first two parts of the three-part test for a short-spacing waiver. The record shows that Beach "made multiple contacts throughout the area in and around San Clemente over a period of years in its effort to obtain a fully-spaced site, apparently to no avail." 7 FCC Rcd at 1351 ¶ 18; *see* 6 FCC Rcd at 5222 ¶ 12. *See also* Beach Exhibit (Ex.) 4; Joint Ex.2; Supplement to Joint Ex. 2. Mt. Wilson challenged Beach's efforts to make the threshold showing in its exceptions to the Initial Decision, but Mt. Wilson did not file an application for review or a contingent application for review. Instead, Mt. Wilson filed a consolidated opposition to the applications for review in which it purports to preserve some of the arguments it made unsuccessfully below. *See Consolidated Opposition of Mt. Wilson,* p.1, n.2. We have reviewed the record on this matter and believe that, although it is a close question, Beach appears to have made the requisite threshold showing under the first two parts of the waiver test. *See WSET, Incorporated,* 80 FCC 2d 233, 242-43 (1980), where we relied upon the statement of the applicant's aviation consultant as to the unsuitability of a non-short-spaced site because, in his opinion, FAA approval would

13. We agree with the ALJ and the Board that Portola "defaulted" and failed to meet the threshold test for a waiver of Section 73.207.[10] *See* 7 FCC Rcd at 1351 ¶ 18 & 1353 n.3; 6 FCC Rcd at 5222 ¶ 12. It is well established that, "[w]hen an applicant seeks a waiver of a rule, it must plead with particularity the facts and circumstances which warrant such action." *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664, 666 (D.C. Cir. 1968).[11] "An applicant seeking a waiver [of Section 73.207] must . . . make a threshold showing, using legitimate engineering evidence, that no properly spaced [site] is obtainable." *North Texas Media v. FCC*, 778 F.2d at 32. *See Kenter Broadcasting Co.*, 62 RR 2d 1573, 1577 (1986), *aff'd*, 816 F.2d 8 (D.C. Cir. 1987) (table). In this case, Portola failed to make this showing. Portola made no independent search for a fully-spaced site or for a lesser short-spaced site, Portola did not present any evidence in this regard to support its request for waiver of Section 73.207, and Portola merely joined in the joint engineering exhibits. 7 FCC Rcd at 1351 ¶ 18. Portola asserts that it was not required to make a threshold showing because the Commission stated in the Channel 285A allotment proceeding that no fully spaced sites appeared to be available. However, as the Board held, "had Portola tried to locate a lesser short-spaced site, it *may* have been successful. But it did not even try, and its failure to do so is fatal to its request for a waiver." *Id.* at 1353 n.3 (citation omitted).

14. Nevertheless, even if we concluded that Portola made the necessary threshold showing, we would further conclude that Portola, like Beach, failed to show that the public interest benefits flowing from a grant of the waiver request "are sufficiently compelling" -- either individually or when considered in the aggregate -- "to offset the magnitude of the potential interference." *Tri-Valley Broadcasting Co., supra*, 4 FCC Rcd at 4712 ¶ 9. *See* 7 FCC Rcd at 1352 ¶ 21 & 1354-55 nn.5-10.[12] Specifically, the record shows that, operating as proposed from Clemente Peak, the applicants' station would cause objectionable interference to 3.4% of the population (330,551 persons) and 3.8% or 430 sq. km. of the area within the protected contour of station KKGO(FM). *See* 7 FCC Rcd at 1350 ¶ 13, citing 6 FCC Rcd at 5222 ¶ 11. In addition, the record shows that KKGO(FM) would cause interference to 26.4% of the population (42,147 persons) and 14% or 81 sq. km. of the area that would otherwise be served by the proposed short-spaced San Clemente station. *Id.* The ALJ and the Board characterized this interference as "patently unacceptable." *See* 7 FCC Rcd at 1352 ¶ 20; 6 FCC Rcd at 5222 ¶ 13. We agree.

15. Although Beach and Portola contend that the ALJ and the Board incorrectly assessed the relevance and/or the significance of the interference which would result between their proposals and station KKGO(FM) if the Commission granted either of their applications, they do not dispute the fact that interference caused by a short-spaced proposal is a factor which may be considered in determining whether to waive the minimum distance separation rule. *See Tri-Valley, supra*, where the extent of interference was so "minimal" (*i.e.*, .3% of the area within the operating station's protected contour) as to have little or no impact on the Commission's ultimate decision to waive the rule. Beach disagrees with the Board's conclusion that the magnitude of the predicted interference in this case would be "patently unacceptable." Beach argues that, because this is only the second short-spacing case in which interference has been considered, with *Tri-Valley* being the first, there are no standards for concluding that the interference here would be "too much."[13]

16. Beach's argument is without merit. Before *Tri-Valley*, the Commission had consistently refused to waive the minimum distance separation rule on the basis of an applicant's claim that no objectionable interference would result because there would be no predicted overlap of the protected and interfering contours of the affected stations. 4 FCC Rcd at 4712 ¶ 9, citing *Florissant Broadcasting Co., Inc.*, 40 RR 2d 428 (1977). *See North Texas Media, Inc. v. FCC, supra*, 778 F.2d at 34-35 n.27; *Sotomayor v. FCC*, 721 F.2d 1408, 1409 n.3 (D.C. Cir. 1983).[14] In *Tri-Valley*, the Commission therefore added a new factor in a case involving a request for a waiver of the distance separation re-

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not be available for that site. *Compare North Texas Media, supra*, ¶ 5, where the applicant "merely alleged that it could not find a non-short-spaced site from which it could serve [its community of license]." The applicant in *North Texas Media* "failed to supply any detailed engineering data or affidavits in support of [its] bare allegation." *Id.* In any event, we agree with the Board that Beach failed to satisfy the critical third part of the waiver test and that Beach's waiver request must, therefore, be denied.

[10] Portola's reliance on *Naguabo Broadcasting Company*, 6 FCC Rcd 4879 (1991), for the proposition that such a showing is not required is unavailing. No question concerning the three-part test was raised or considered in the Commission's order. In any event, however, the record in that case contains evidence of the efforts of the applicant in question to meet the first and second parts of the three-part test. *See Naguabo Broadcasting Company*, 5 FCC Rcd 2062, 2068-69 ¶ ¶ 59-62 (ALJ 1990).

[11] "The burden is on the applicant seeking waiver . . . to plead specific facts and circumstances which would make the general rule inapplicable." *Tucson Radio, Inc. v. FCC*, 452 F.2d 1380, 1382 (D.C. Cir. 1971).

[12] Portola argues that Section 73.207 should be waived because its owner/manager is a member of a recognized minority group. The Review Board properly rejected this argument and we affirm its decision on this matter. *See* 7 FCC Rcd at 1355 n.10. We note that an identical argument was made by a minority-owned applicant seeking a short-spacing waiver in *North Texas Media, Inc., supra*. We rejected the argument in that case because we could not "accept the [applicant's] inference that its minority status entitles it to [a] waiver of [the] purely technical standards [embodied in Section 73.207]. These standards were adopted as 'go, no-go' criteria after the Commission rejected the previous *ad hoc* approach. Waiving these standards on the basis of non-technical considerations would tend to undermine the allocation system as a whole. . . . As significant as considerations related to promotion of minority ownership may be in the context of a comparative hearing, we cannot say that the integrity of our basic allocations system is any less important." *North Texas Media, Inc., supra* at ¶ 8 (footnotes omitted). *See ICBC Corp. v. FCC*, 726 F.2d 926, 929 (D.C. Cir. 1983). We see no reason to depart from this precedent in this case.

[13] *But cf. Golden West Broadcasters*, 4 FCC Rcd 2097 (1989), where the Commission considered interference between FM stations in a case involving a request for a waiver of the maximum height and power requirements for FM stations.

[14] The Commission reasoned in the pre- *Tri-Valley* cases that use of protected and interfering contours as an assignment tool for commercial FM broadcast stations was specifically rejected in 1962 when the Commission adopted the minimum distance separation rule. In the Commission's judgment, distance separations offered a more simplified analysis of potential interference and ensured that stations initially operating at less than full

quirements of Section 73.207. The Commission held that, "where an applicant seeking waiver of th[is] . . . requirement has made the necessary threshold showing that no suitable fully spaced or less short-spaced sites are available, . . . predictions of the protected and interfering contours of the affected stations . . . provide some measure of the extent of objectionable interference potentially involved and, thus, are useful in making our determination as to whether the public interest benefits are sufficiently compelling to offset the magnitude of the potential interference." 4 FCC Rcd at 4712 ¶ 9.

17. *Tri-Valley* thus offered waiver applicants the opportunity to demonstrate that the public interest would be served by a waiver by showing that the "objectionable interference" in the applicant's particular case is outweighed by identifiable and "compelling" public interest benefits. *Id.* Depending on the facts adduced in the record, this additional showing in waiver cases could lead to grants of waivers in some cases, as in the *Tri-Valley* case where the showing was successfully made, or to denials of waivers in other cases, such as this one, where the necessary "compelling" public interest showing was not made. However, this does not mean, as Beach suggests, that we cannot make the appropriate public interest judgment in this case based on the evidence adduced at the hearing simply because this is the second short-spacing case where the showing called for in *Tri-Valley* is being considered.

18. The facts in this case are much different than the facts in *Tri-Valley*. In *Tri-Valley*, the applicant made a compelling showing in support of a waiver of Section 73.207. Specifically, it demonstrated that it had been issued a construction permit before it lost its properly spaced site and that it was providing a first local service to its proposed community. In addition, state and local officials expressed their concern that terrain obstruction prevented the community of license from receiving adequate coverage from any other radio station, and there was a nuclear power plant nearby, underscoring the need for a first local radio station in the case of an emergency. Furthermore, "the area predicted to receive interference by [an existing station's] own calculations [wa]s minimal, representing less than .3% of the area within [the existing station's] protected contour." Under all of these circumstances, the Commission granted a waiver. 4 FCC Rcd at 4712. *See* 7 FCC Rcd at 1353 n.2.

19. There are no comparable public interest benefits in this case. The evidence shows that San Clemente already has a local radio station, that the community is served by more than 30 other radio signals from nearby cities, and that severe, rather than minimal, interference would result from allowing a short-spaced operation on Channel 285A at San Clemente. With respect to interference in particular, the record evidence shows that, due to the proposed short-spacing, 42,147 persons, or more than one-quarter of the population within the protected contours of Beach's and Portola's proposed facilities, "would be unable to adequately hear the radio stations." *Initial Decision*, 6 FCC Rcd at 5222 ¶ 13. Furthermore, even if the applicants were able to provide interference-free service to all of the 160,000 persons within their proposed service area, more than twice that number (or 330,551 persons) would *lose* existing service from station KKGO(FM). We agree with the Bureau that these may be numbers of first impression, but they hardly make this a borderline case. We therefore conclude that the Board properly considered the evidence of potential interference in this case and correctly weighed that evidence against the public interest benefits alleged by the applicants. *See* 7 FCC Rcd at 1352 ¶ ¶ 20-21. *Cf. Television Corp. of Mich., Inc. v. FCC*, 294 F.2d 730, 732 (D.C. Cir. 1961); *Hall v. FCC*, 237 F.2d 567, 572 (D.C. Cir. 1956) (any deprivation of broadcast service to any group of people is *prima facie* not in the public interest and can be justified only by countervailing public interest factors sufficient to offset that deprivation).

20. Both Beach and Portola argue that, if interference is to be considered, the only interference that is relevant is that which differs from the interference that would result from utilization of a properly spaced transmitter site. We disagree with the applicants and reject their argument. Evidence as to the degree of interference that would result from a fully-spaced site is not relevant in considering whether or not a waiver should be granted because we are *not* dealing here with a fully-spaced site. *See* 6 FCC Rcd at 5223 ¶ 14. A properly spaced site for the San Clemente allotment is not available and no one has proposed operation from such a site. Therefore, hypothetical calculations based on an unavailable site are irrelevant in this proceeding. There is no more reason to compare one particular hypothetical properly spaced site with the actual proposals from Clemente Peak, as the applicants seek to do, than to compare possibly dozens of other properly spaced sites. The results would provide us with little meaningful information, except that the interference would be less from a properly spaced site than from the proposed short-spaced site.

21. Finally, we have considered the alleged public interest benefits of a grant, which are cited by the applicants in their applications for review and listed in n.6, *supra*. We agree with the Review Board that the public interest benefits asserted by Beach and Portola are not sufficiently compelling, either individually or collectively, "to overcome the severe interference considerations, especially with one facility already licensed to San Clemente and the conceded presence of more than 30 other radio signals available in the community (from nearby cities)." 7 FCC Rcd at 1352 ¶ 21. *See* 7 FCC Rcd at 1354-55 nn.5-10.

22. We disagree with Beach that the "equities" of the applicants somehow outweigh the need to protect the public from the loss of an existing service that would result from a grant. Beach's argument to the contrary, we are aware of the considerable efforts -- and expense -- of the applicants in prosecuting their applications for a new radio station on Channel 285A in San Clemente. We had been hopeful from the outset of this proceeding that an acceptable short-spaced site would be found and that one of the applications could be granted in the public interest, but the record establishes that neither of the applicants was able to prove at the hearing that there is such a site or that the

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facilities for their class would have the opportunity to increase to maximum facilities in the future. The Commission took the position in distance separation cases before *Tri-Valley* that the protected contour concept would cause delays and burdens to the Commission, private parties and, ultimately, the public and would not afford the "go, no-go" certainty and flexibility inherent in the table of allotment/minimum distance separation scheme adopted in 1962. *See North Texas Media, Inc. v. FCC*, *supra* at 30-31.

public interest, as opposed to the private interests of the applicants, would be served by a waiver of Section 73.207. In short, the loss of existing service in this case would be substantial and contrary to the public interest. As the Review Board held, "the applicants were on notice that the establishment of a facility at San Clemente would require overcoming some very high hurdles, indeed." 7 FCC Rcd at 1352. The applicants did not overcome these hurdles and "there are not sufficient equitable considerations present here to overcome the[] interference considerations." *Id.* The record thus dictates denial of both applications.

IV. CONCLUSION

23. We have afforded Beach's and Portola's waiver requests the "hard look" called for under *WAIT Radio v. FCC, supra,* 418 F.2d at 1157, and, based on the evidence in the record, have concluded that the policy considerations underlying the *Townsend, Megamedia,* and *Tri-Valley* cases and our FM allocations scheme clearly outweigh any future benefits which might accrue if either application were granted. Therefore, we agree with the ALJ and the Board that the applicants' waiver requests must be denied, that the applicants are unqualified, and that their applications must, therefore, be denied.

24. In the channel allotment proceeding, we stated that we would not have allotted Channel 285A to San Clemente in the first place had we known at the time that no site was available for its use by a fully-spaced station. We also stated that the channel would remain allotted to San Clemente in light of the fact that applications for the channel were pending at the time and the applicants were contending that there were grounds for a waiver of Section 73.207. *Amendment of Section 73.202(b) (San Clemente, California),* 3 FCC Rcd at 6729. Now, having carefully considered the waiver requests of the applicants and having concluded that the public interest would not be served by a grant of either of the remaining applications for the channel, we believe that a properly spaced station on this channel may never be possible and, therefore, that the allotment of the channel may no longer serve the public interest. This is especially true in light of the continuing and vigorous opposition of the U.S. Marine Corps to the erection of a radio tower on or near Camp Pendleton. Therefore, we direct the Bureau to initiate as quickly as possible a notice and comment rule making proceeding looking toward the deletion of Channel 285A at San Clemente from the Table of FM Allotments. *See* Section 1.411 of the Commission's Rules; *Amendment of Section 73.202(b) (Pinckneyville, Illinois),* 41 RR 2d 69 (Broadcast Bureau 1977).

25. ACCORDINGLY, IT IS ORDERED, that pursuant to 47 C.F.R. §1.115(g) the application for review filed March 13, 1992, by Portola Broadcasting Corporation, and the application for review filed March 23, 1992, by On the Beach Broadcasting ARE DENIED.

26. IT IS FURTHER ORDERED, that the motion filed on April 2, 1993 by On the Beach Broadcasting for permission to withdraw its petition for leave to amend and associated pleadings IS GRANTED; that its petitions for leave to amend and for reopening the record filed on June 25, 1992 ARE therefore DISMISSED; and that the petition of Mt. Wilson FM Broadcasters, Inc. for leave to file supplement to opposition to petition for leave to amend, filed July 17, 1992; the petition of Mt. Wilson FM Broadcasters, Inc. for leave to file supplement to opposition to petition to reopen record, filed July 17, 1992; the petition of On the Beach Broadcasting for leave to file consolidated reply and comments, filed July 17, 1992; the petition of Mt. Wilson FM Broadcasters, Inc. for leave to file additional pleading, filed July 21, 1992; the petition for leave to file supplement to amendment, filed July 28, 1992, by On The Beach Broadcasting; and the petition for leave to file second supplement to amendment, filed August 13, 1992, by On The Beach Broadcasting ARE DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Concurring Statement
of
Commissioner Ervin S. Duggan

In re: On the Beach Broadcasting

This case should properly be called "The Allotment That Wouldn't Die."

Based on a highly disputed statement from a military official, the Commission allotted a channel to San Clemente where the only feasible tower site would have been on the property of Camp Pendleton. As a consequence of this curious move, the Commission sent unwitting applicants through an eight-year regulatory maze to make good use of the channel allotment even as it became clear that military officials would never allow the building of a broadcast station on the base.

To add insult to injury, it now appears that the Commission's action may have been unprecedented, given the fact that the military has rarely, if ever, allowed this type of commercial construction on military property. It is therefore fitting, and unfortunately too late for these applicants, that we now drive a final nail into the coffin of this allotment.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

NATIONAL UTILITIES, INC. File No. MSDCD-93-02

Basic Exchange Telecommunications
Radio Service in the Public
Land Mobile Service in Alaska

ORDER

Adopted: May 3, 1993; Released: May 10, 1993:

By the Chief, Mobile Services Division:

1. In October and November 1992, National Utilities, Inc. (National) brought to the Commission's attention the fact that it had constructed and operated Basic Exchange Telecommunications Radio Service facilities in the Public Land Mobile Service at Tok, Skagway, Naukati, and Whale Pass, Alaska, without obtaining prior Commission authorization. The Mobile Services Division (MSD) initiated an investigation into this matter.

2. The MSD and National have reached an agreement which would terminate the MSD's investigation. The terms and conditions of this agreement are contained in the attached Consent Decree.

3. We have reviewed the terms of the Consent Decree and evaluated the circumstances of this case. We believe that the public interest would be served by approving the Consent Decree, the terms of which are incorporated herein by reference.

4. Accordingly, IT IS ORDERED that the Consent Decree attached to this Order IS ADOPTED.

5. IT IS FURTHER ORDERED that the investigation of National Utilities, Inc., initiated by the Mobile Services Division, IS TERMINATED.

6. IT IS FURTHER ORDERED that this Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

John Cimko
Chief, Mobile Services Division
Common Carrier Bureau

CONSENT DECREE

I. INTRODUCTION

1. This is a Consent Decree (the "Decree") between the Chief of the Mobile Services Division ("MSD") and National Utilities, Inc. ("National").

2. Under the terms of this Consent Decree, National agrees to make a voluntary payment totalling $32,000 for deposit into the United States Treasury, and the MSD terminates its investigation into the matters alleged in this proceeding.

II. BACKGROUND

3. National operates ten wireline exchanges in the State of Alaska, including exchanges in Tok, Skagway, Naukati, and Whale Pass. National constructed and operated Basic Exchange Telecommunications Radio Service at these four communities without obtaining Commission authorization.

4. Following discovery of the matter, on October 23, 1992, National orally notified the MSD of its unauthorized construction and operation, and written notification and confirmation was provided to the MSD on October 30 and November 11, 1992. At the initiation of National, meetings were held with MSD staff. National filed requests for Special Temporary Authority on October 30 and November 27, 1992, to continue operating the facilities, and the requests were granted by the MSD on October 5, 6, and 16, 1992, and November 30, 1992. Applications for permanent operating authority were filed on December 7 and 16, 1992. The MSD has reviewed various submissions by National concerning the circumstances of the unauthorized construction and operation, including procedures that National has established within the company to prevent future occurrences of unauthorized construction and operation.

III. DEFINITIONS

5. For the purposes of this Decree, the following definitions apply:

(a) "National" means National Utilities, Inc., or any of its successors in interest.

(b) "Order" means an order of the MSD adopting the terms and conditions of this Decree.

(c) "Final Order" means an Order of the MSD that is no longer appealable or subject to administrative or judicial reconsideration, review, appeal, or stay.

IV. AGREEMENT

6. National admits the jurisdiction of the Commission over it, and the subject matter of this action for purposes of this Decree and the Order adopting this Decree. All necessary jurisdictional facts are hereby admitted for purposes of this Decree.

7. National waives any rights it may have to judicial review, appeal, or rights otherwise to challenge or contest the validity of any Order adopting this Decree. National agrees that upon signing by National and the MSD, the provisions of this Decree shall be incorporated by reference in the Order formally adopting this Decree.

8. This Decree is for purposes of settlement only, and its signing does not constitute an admission by National of any violation of law, rules, or policy.

9. In consideration for the MSD's entering into this Decree and in order to avoid any disruption of service to the public, to conserve Commission resources, and in order to avoid litigation costs, National hereby agrees to the following terms:

(a) National will make a voluntary payment to the United States Treasury, without further protest or recourse, in the amount of $32,000, within five days after the Order adopting this Decree becomes a Final Order. Payment may be made by mailing a check or similar instrument to the Commission, payable to the order of the Federal Communications Commission, to Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482.

(b) National agrees that the contribution of $32,000 to the United States Treasury may not be claimed as a tax deduction.

(c) The failure of National to comply with these terms will be considered a failure of compliance with this Decree.

10. In light of the covenants and representations contained in this Decree, and in express reliance thereon, the MSD will terminate its investigation of National. Such termination is without a finding by the MSD of wrongdoing by National. Further, the MSD will not institute, on its own motion, any proceedings against National based upon the information obtained during the investigation. The MSD will not conduct further proceedings of any kind based on the matters raised or investigated herein unless information beyond that made available in this proceeding and which warrants inquiry is presented.

11. National agrees that any violation of the Order or this Decree shall constitute a separate violation of a Commission order, entitling the Commission to exercise any rights and remedies attendant to the enforcement of a Commission order.

12. If this Decree is not signed by the MSD and National, or is otherwise rendered invalid by any court of competent jurisdiction, it shall become null and void and may not be used in any fashion in a legal proceeding.

13. If the Commission, or the United States on behalf of the Commission, brings an action in any United States District Court to enforce the terms of the Order incorporating the terms of this Decree, National agrees that it will not contest the validity of the Order, will waive any statutory right to a trial *de novo*, and will consent to a judgment incorporating the terms of this Decree.

FEDERAL COMMUNICATIONS COMMISSION

COMMON CARRIER BUREAU
MOBILE SERVICES DIVISION

By: _____
John Cimko, Chief

NATIONAL UTILITIES, INC.

By: _____

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COLEMAN COUNTY TELEPHONE COOPERATIVE, INC. — File No. 776581 92076

For Authority to Construct and Operate a Private Operational-Fixed Microwave Service Station

MEMORANDUM OPINION AND ORDER

Adopted: April 23, 1993; Released: May 10, 1993

By the Commission:

1. Coleman County Telephone Cooperative, Inc. (Coleman) seeks review of a Private Radio Bureau action dismissing its application for two Private Operational-Fixed Microwave Service (OFS) H-group channels at Santa Anna, Texas.[1] Coleman asserts that the Bureau erroneously applied the one-day cut-off provision of Section 1.227(b) of the Commission's Rules, 47 C.F.R. § 1.227(b), to its proposal.

2. Section 1.227(b) sets forth administrative procedures for handling mutually exclusive applications. To govern the filing of such applications, Section 1.227(b)(4) establishes a one-day cut-off for OFS applications. Hence, conflicting applications filed on the same day are processed as mutually exclusive. Later-filed applications that conflict with earlier-filed applications for the same facilities are dismissed as untimely filed.

3. Coleman filed its application on August 26, 1991. Its proposed transmitter site, however, was located approximately 46 miles from the transmitter site of a previously filed (July 8, 1991) application, a distance closer than the 50 mile co-channel separation standard established in our *Public Notice*, FCC 85-12, 50 FR 6992 (February 19, 1985). Thus, the Coleman application was dismissed on October 1, 1991, as untimely filed with respect to a pending application.

4. Coleman sought reconsideration of this dismissal, claiming that the applications were not mutually exclusive. Coleman observed that it had followed the provisions of Section 94.15(b) of the Commission's Rules, 47 C.F.R. § 94.15(b), and had submitted with its application a frequency engineering analysis demonstrating an absence of proscribed interference and a statement by the affected party agreeing to Coleman's proposed operation. Coleman argued that this submission rendered the two proposals complementary rather than conflicting. Hence, it maintained, the cut-off provisions of Section 1.227(b) were inapplicable.

5. The Private Radio Bureau's Licensing Division denied the petition for reconsideration, holding that an application must first meet the requirements of Section 1.227(b) with respect to mutual exclusivity before engineering and interference concerns could be addressed. Coleman now seeks review of this decision, arguing that the Bureau's interpretation of our rules was erroneous.

6. We conclude, however, that the Bureau correctly applied all relevant provisions. Section 1.227(b) sets forth procedures for the processing of applications. These procedures may include, for administrative efficiency as well as policy goals, the establishment of cut-off provisions. *Century Broadcasting Corporation v. FCC, 310 F.2d 864 (D.C. Cir. 1962)*. Coleman County's attempt to accelerate its place in the processing line would cause substantial difficulties for our processing staff. Under Coleman County's preferred method of processing OFS applications, if it filed an application on day 1 and other applicants later filed applications within 50 miles of Coleman County's application, the staff could not begin work on Coleman County's application until it was sure these other applicants each had submitted the necessary short spacing agreements not only to Coleman County but also to each other, any other previously filed applications, or existing licensees. This would complicate processing considerably and cause delay. Under our existing policy, considerably less checking and cross-checking is necessary, thereby easing our processing burden.

7. It is for these reasons that, upon being tendered for filing, an application must first survive the hurdles of Section 1.227(b). Only then will matters such as Coleman's request for deviation from the OFS separation standard be considered on their merits.[2] This practice is consistent with and similar to our actions in other services. *See Bill R. Wright*, 102 FCC 2nd 1142, 1147-8 (1985). There, Bill R. Wright had himself been mutually exclusive with several other low power television applicants. By changing frequencies, Wright managed to remove himself from mutual exclusivity with those other applicants. A would-be applicant then wished to file an application mutually exclusive with Wright's. The Commission held that Wright's application should be processed alone, stating that "our cut-off procedures allow applications to be processed to a conclusion without interruption and the necessity of reprocessing because of new filings and amendments to pending applications," and citing the administrative difficulties that the opposite result would entail.

8. In contrast with the administrative concerns of Section 1.227(b), Section 94.15(b) by its terms sets forth policies governing the assignment of frequencies. The information concerning interference and consent that it elicits assures us that existing and proposed stations will not interfere with each other's operations, or, if they do, that all affected

[1] The application was dismissed by letter of October 1, 1991; a petition for reconsideration of the dismissal was denied by letter of January 9, 1992. Both actions were taken by the Chief, Microwave Branch, Licensing Division.

[2] Applications for stations within 50 miles of a previously *authorized* co-channel station are accepted for filing if they contain both a detailed analysis that an exception is warranted and a statement of agreement from all affected parties. *See, e.g.*, Public Notice, Mimeo No. 536, released November 17, 1988, 47 CFR Section 94.15(b). The potential processing delays caused by later-filed short spaced applications do not arise in the context of shortspacing to already authorized stations.

parties have agreed to the situation. With this information, we can maximize use of scarce spectrum while preserving the integrity of individual assignments.

9. Coleman creates conflict between the two provisions by finding in Section 94.15(b) a right to submit applications with a special showing justifying short-spacing arrangements. This right is violated, it argues, by a one-day cut-off that prevents applicants from effectively exercising it. Thus, if an applicant cannot study a pending proposal, Coleman maintains, it cannot possibly prepare an engineering analysis or secure the consent of affected parties.

10. We find no conflict between the provisions, however. Nothing in Section 94.15(b) entitles applicants to seek a short-spaced assignment. Rather, the section simply sets forth the information necessary to justify one where appropriate. Coleman's interpretation would undermine the goals of our one-day cut-off provision[3] and our bar on the assignment or transfer of unconstructed OFS facilities.[4] Further, it would cause substantial difficulties for our processing staff. If Coleman wishes to locate an H-group station within 50 miles of a pending proposal, it must either submit its application and waiver request on the same day that the other application is submitted or it must wait until the first application is granted, at which time it may submit an application of its own.[5]

11. We conclude in light of the above that the application was properly dismissed. Accordingly, IT IS ORDERED, that the application for review filed by Coleman County Telephone Cooperative, Inc. IS DENIED; and the dismissal of its application File No. 776581 IS AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[3] The one-day cut-off provision discourages the photocopying and resubmission, with minor changes, of existing applications, a common practice of H-channel application mills. Report and Order, Gen. Docket Nos. 90-54, 80-113, 5 FCC Rcd 6410, 6424 (1990); *recon. granted in part and denied in part,* 6 FCC Rcd 6764 (1991).

[4] Section 94.47(b), 47 C.F.R. § 94.47(b). *Compare,* Report and Order, PR Docket No. 90-34, 6 FCC Rcd 4929, 4930-31 (1991), retaining existing requirements in the Specialized Mobile Radio Service that systems of all co-channel licensees consenting to a short-spacing arrangement be constructed and in operation.

[5] In a request for leave to file supplement to request for reconsideration, Coleman reported grant of the conflicting proposal. Contrary to its suggestion, this fact did not permit reinstatement of its proposal. Rather, the grant permitted submission of a new application.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Application of CSR-3813
W.A.V., Inc.
Operator of Cable Television
Systems in Woodside,
California *et al.*

Pursuant to 47 U.S.C. §537

MEMORANDUM OPINION AND ORDER

Adopted: April 27, 1993; Released: May 10, 1993

By the Chief, Mass Media Bureau:

1. On April 6, 1993, W.A.V., Inc. ("WAV") filed a request for authority to transfer ownership of several cable systems pursuant to the anti-trafficking provision contained in §617 of the Communications Act of 1934, as amended. 47 U.S.C. §537. WAV seeks this authority so that it may dispose of its interests in certain cable television systems serving 2,171 subscribers in various northern California communities.[1] WAV's request has been reviewed and the transaction involved found to be in compliance with both the specific provisions and the intended objectives of §617 and accordingly authority is hereby granted for the transactions described.

2. Section 617 was recently added to the Communications Act of 1934 as part of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Act"). Section 617, which establishes a three-year holding period for cable systems, is largely self-executing and became effective on December 4, 1992, pursuant to the terms of the 1992 Act. Section 617 provides, with certain exceptions, that "no cable operator may sell or otherwise transfer ownership in a cable system within a 36-month period following either the acquisition or initial construction of such system by such operator." 47 U.S.C. §537(a). Section 617(d) authorizes the Commission to grant waivers of this restriction consistent with the public interest. Such waivers, however, are subject to the prior approval of the local franchise authority, if such approval is required. The 1992 Act specifically directs the Commission to use its waiver authority to permit "appropriate transfers in cases of default, foreclosure, or other financial distress."[2]

3. At present, WAV's stock is owned 50% by Richard H. Jansen-Olliges and 50% by Larry Whitney. Following the proposed sale however, 100% of WAV's stock will be owned by Balkin Cable Investment and Management Group, L.P. ("Balkin").[3] Mr. Whitney will be an employee of Balkin, with a limited partnership interest constituting appropriately 20% of its capital, but he ". . . will not control Balkin, WAV or the cable systems and SMATV systems currently owned and operated by WAV."

4. Mr. Jansen-Olliges has been advised by his physician, to liquidate his assets in order to reduce any difficulties in administering his estate in view of a "chronic viral illness" which he has, for which there is no long-term cure. WAV maintains that as a result of Mr. Jansen-Olliges illness, it is facing financial distress. When WAV constructed the systems serving Portola Valley and Woodside, it exceeded its budget by some $1,434,000. At that time, WAV renegotiated its loan with Merchants Bank and Trust of Indianapolis, Indiana in order to avoid default. However, the resulting loan provides for termination with a substantial balloon payment in June 1993. Meanwhile National City Bank has acquired Merchants Bank, and National has indicated that it has no desire to continue a loan in California or in the cable industry. Alternative lenders have failed to materialize either because of Mr. Jansen-Olliges' illness, or because of his desire to liquidate his investment, or WAV's current debt structure, or because of the lenders' desire to deal with entities larger than WAV.

5. Petitioner claims that, taken as a whole, the above facts should be sufficient to justify waiver of §617, particularly in view of the fact that §617(d) specifically provides for waiver due to "other financial distress." In addition, petitioner notes that, prior to the enactment of §617, the Commission had a similar restriction which prohibited trafficking in broadcast facilities. This provision also contained a specific exemption for cases such as this where the ". . . assignor or transferor has made an affirmative factual showing, supported by affidavits of a person or persons with personal knowledge thereof, which establishes . . . death or disability of station principals. . . ." *See* former §1.365(a)(3) of the Commission's Rules. *Report and Order in Docket No. 13864*, 32 FCC 689, 702 (1962). According to petitioner, it is inconceivable that Congress meant to preclude a waiver which is consistent with the public interest where one of the principal reasons for the request is the currently incurable illness of one of the two owners of the business concerned.[4]

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[1] According to WAV, cable systems serving the following areas will be sold, even through they began operations within three years from the date this petition was filed: unincorporated Woodside (CA 1377), Los Trancos Woods (CA 1461), Woodside (CA 1463), Portola Valley (CA 1464), Yolo County Central (N/A), and Skylonda (N/A). In addition, Redwood Mobile Estates (CA 1462) will be under the purchaser's control, but will remain with WAV.

[2] Since the Commission intends to codify this anti-trafficking restriction into its rules, the Commission issued a *Notice of Proposed Rule Making and Notice of Inquiry in MM Docket No. 92-264*, 8 FCC Rcd 210 (1992), seeking comments on the interpretation and implementation of this provision. While more specific rules may be adopted, the provisions of the statute, including the exemption provision, are already in force. The action taken herein is, of course, without prejudice to whatever action may be taken through the rulemaking process adopting additional or different procedural or substantive requirements.

[3] It is anticipated that this name will be changed to Balkin Cable Holdings, L.P. prior to closing.

[4] Alternatively, WAV contends that the Commission could find that §617 does not apply to this situation, since §617 was not intended to hinder MSO transfers.

6. Although the 1992 Act does not specifically define the term "financial distress," Commission rules provide an exception to the one-year broadcast holding period where a broadcast station establishes that, because of the unavailability of capital, a proposed assignment or transfer satisfies the public interest. 47 C.F.R. §73.3597(a)(4). Moreover, the Commission previously granted waivers from its three-year broadcast anti-trafficking rule in cases of financial distress upon showings that a station was operating at a loss. *See, e.g., Turner Communications Corp.*, 23 RR 2d 1046, 1047 (1972); *Voice of the Caverns, Inc.*, 8 RR 2d 741, 746 n.5 (1966).

7. The circumstances presented by WAV in its waiver request are consistent with our obligation under §617(d) to waive the anti-trafficking rule to allow transfers in cases of default and financial distress. The circumstances involved in this particular transaction clearly constitute financial distress sufficient to warrant a waiver of the cable anti-trafficking provision. Moreover, we find no evidence to suggest that WAV is engaging in the type of profiteering or trafficking transactions that Congress intended to prevent. The Commission's waiver authority in these circumstances is unequivocal, and it is not subject to inquiry in the outstanding rulemaking proceeding. Grant of this waiver, however, is conditioned upon receipt of the requisite approval from each franchising authority. *See King Kable, Inc.*, 8 FCC Rcd 1515, 1516 (1993).

8. In view of the foregoing, we find that grant of WAV's petition for waiver of §617 of the Communications Act of 1934, as amended, is in the public interest.

9. Accordingly, IT IS ORDERED that, the requested authority under §617 of the Communications Act of 1934, filed by WAV is hereby Granted and will be effective at such time as WAV certifies to the Commission that it has obtained all requisite transfer approvals from each franchising authority in every community where such approval is required for transfer of the systems involved.

10. This action is taken by the Chief, Mass Media Bureau pursuant to authority delegated by §0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-430

In re applications of

MARIA M. OCHOA File No. BPH-890615ME

FOOTHILLS BROADCASTING, INC. File No. BPH-890616MR

For construction permit for
new FM station, Channel 277A,
Lenoir, North Carolina

MEMORANDUM OPINION AND ORDER

Adopted: May 3, 1993; Released: May 10, 1993

By the Commission:

1. We have before us an application for review of the Review Board's decision in this case, *Maria M. Ochoa,* 7 FCC Rcd 6569 (1992), filed by Maria M. Ochoa on November 12, 1992. The decision under appeal holds that Ochoa is disqualified for giving deceitful testimony, that Foothills Broadcasting, Inc. is not disqualified, and hence that Foothills' application should be granted. (A third applicant that was also found disqualified has filed no appeal.) Ochoa contends that the Board should have exonerated her of the charge of misrepresentation and should have found Foothills disqualified, instead.[1] We disagree with Ochoa's contentions and affirm the Board's disposition of the two remaining applications.

2. *Foothills:* Ochoa objects that the Board ignored allegedly false testimony by Foothills' non-voting stockholder, Wallace Respess, that he is merely a passive investor and also overlooked the alleged fact that Foothills falsely denied in its exceptions that any of its principals had ever represented that Respess is a passive and insulated investor. The portions of the record that Ochoa cites, however, reveal that these assertions are baseless. Respess did not testify at Tr. 514, as alleged, that he is a "passive investor" but rather that he had no intention of participating in daily station management, and Ochoa does not point to any proof that this testimony was fallacious. And it appears that Foothills merely stated the plain truth when it asserted in exceptions that it had never alleged that Respess was a "passive" or "insulated" investor but rather that he is a non-voting stockholder who does not intend to participate in daily station management.

3. *Ochoa:* The other issue in contention is whether in responding to examination concerning statements to former co-workers about her intentions regarding implementation of her integration proposal, Maria Ochoa was a truthful and candid witness. Ochoa has claimed integration credit on the basis of representations that she would participate full-time in daily management of her proposed Lenoir FM station. Accordingly, in her direct written case she pledged to quit her then-current position as sales manager of Station WMXC-FM in Charlotte, North Carolina, and move to Lenoir in the event the Commission granted her application. *Id.* at 6569 ¶ 2. Opposing counsel sought to raise doubt as to the sincerity of the pledge by questioning her at the hearing about what she had told others at WMXC about her actual intentions and by presenting past and present WMXC employees as rebuttal witnesses.

4. In light of the evidence thus developed, the ALJ found that Maria Ochoa had never intended to move to Lenoir and therefore that she deserved no integration credit. 7 FCC Rcd 1861, 1866 ¶ ¶ 76-78. Further, he concluded that she had testified falsely concerning her conversations with other WMXC employees. *Id.* at 1866 ¶79, 1869 ¶22. Therefore, invoking the principle that it is unnecessary to formulate a hearing issue to put an applicant on notice of the duty to testify truthfully, the ALJ held that Ochoa should be disqualified for misrepresentation, notwithstanding that no misrepresentation issue had been formally specified against her. *Id.* at ¶ ¶ 23-26.

5. Ochoa argued in exceptions that she could not fairly be disqualified for the alleged misrepresentations absent previous specification of a pertinent formal hearing issue. She contended, moreover, that the ALJ had erred in finding that she had testified inconsistently about her conversations with WMXC employees concerning her Lenoir application and its bearing on her career plans, 7 FCC Rcd at 6571 ¶ 7, and asserted that the testimony of the rebuttal witnesses was tainted by bias. The Board denied her appeal, confirming the finding that she had lied in testimony and agreeing with the ALJ that it is fair to disqualify her for that reason despite the absence of advance formal notification that this might be done. *Id.* at 6571-72 ¶ ¶ 8-10. The Board affirmed the misrepresentation finding because it found that Ochoa had asserted in the first instance that she had told her former supervisors and co-workers that she would move to Lenoir if her application were granted and had later "disavowed" her testimony to that effect during her final appearance on the stand. *Id.* at 6571 ¶ 9. The Board indicated that it did not rely on the testimony of the

[1] Foothills filed an opposition to the application for review on November 25, 1992. On December 10, Ochoa filed a motion to strike the opposition. Foothills filed an opposition to the strike motion on December 17, and Ochoa filed a motion to strike that pleading on December 21. We will dismiss both strike motions. The first alleges that Foothills' opposition improperly contends that Ochoa did not demonstrate the reliability of her integration proposal. Because our resolution of this case involves no consideration of such a contention, Ochoa's first motion to strike, Foothills' opposition, and Ochoa's second motion to strike are all moot.

Our action in this case was delayed slightly beyond the period prescribed by *Proposals to Reform the Commission's Comparative Hearings to Expedite the Resolution of Cases,* 6 FCC Rcd 157, 164 ¶50 and n.33 (1991) for Commission action on applications for review in routine cases.

rebuttal witnesses, however, and hence declined to address the exceptions concerning their bias or veracity. *Id.* at 6572 ¶11 .

6. In her application for review Ochoa contends, again, that it is unfair to disqualify her based on evidence compiled in the absence of a formally-specified character issue. That argument has already been refuted for good and sufficient reason, the crux of which is that the absence of formal notice in this instance is a mere technicality, as Ochoa had actual notice that the veracity of her testimony regarding her pertinent comments to WMXC employees was at issue and had ample opportunity thereafter to adduce evidence bearing on that question.7 FCC Rcd at 6571 ¶ ¶ 8-9.

7. Ochoa's other main contentions -- that her testimony was not, in fact, self-contradictory, contrary to what the lower decisions have found, and that the conflicting testimony of the four rebuttal witnesses is not credible -- warrant comment but do not justify a change in result.

8. As to the consistency of Ochoa's testimony, there is a significant difference between the account of relevant conversations that she gave before the appearance of the rebuttal witnesses and the one she gave afterward. Her initial account, which she gave without knowing that her former associates at WMXC would be called as witnesses, was clearly more self-serving. Thwarting attempts to elicit admissions that would undermine her integration pledge, Ochoa repeatedly affirmed under cross examination at the first hearing session that she had told her supervisors at WMXC that she was proposing to leave WMXC if her Lenoir application was granted. Tr. at 82, 104. She also categorically denied having said that she never intended to work at the proposed station or that she would withdraw her application in return for payment from the other applicants in a settlement. Tr. at 113-114, 116-17. She gave no indication that she had said anything that could have caused anyone to suppose that she did not mean to carry out her integration pledge. But in redirect examination after the rebuttal witnesses had testified that she had told them that she had no intention of moving to Lenoir, she admitted that she had deliberately lead them to believe that there was little or no chance that she would leave WMXC in order to work full-time at the Lenoir station. Tr. at 970-71, 989-90, 1002-03. In light of these discrepancies, it is plain that Ochoa's initial testimony about her remarks to her former associates was deliberately misleading. Although Ochoa quarrels with this reading of her testimony, we conclude that the Board ruled correctly in holding her disqualified.

9. In addition to arguing that her testimony was not self-contradictory, Ochoa also argues that she should not be found guilty of deceit based on the testimony of other witnesses. We disagree. Ochoa categorically denied that she had told Jake Gurley, her former supervisor, that she had no intention of moving to Lenoir because she planned to withdraw in exchange for a settlement payment or else sell the station. Tr. at 113-17. Ochoa also asserted that she had told Gurley and another supervisor, Rita Thorne, that she did intend to move to Lenoir if she got the grant. Tr. at 1005-07, 1009. This testimony is squarely contradicted by the detailed and mutually-consistent testimony on point from four witnesses, which is not disputed by any witness other than Ochoa. See Tr. at 360-61, 366-68, 372, 377-79, 606, 618, 658-59, 702, and 709-10 and the testimony cited at 7 FCC Rcd 6570 ¶ 5. The ALJ, who heard the impeaching testimony, plainly indicated by his findings that he found it credible, 7 FCC Rcd at 1866 ¶77, and that determination of credibility is not to be lightly cast aside. See *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1950), and *NLRB v. Stor-Rite Metal Products, Inc.*, 856 F.2d 957 (7th Cir. 1988).

10. Ochoa's attempt to pass off the contradiction as merely due to misunderstanding cannot be credited in light of the undisputed fact that *all four* rebuttal witnesses understood her to say, on various occasions, that she had no intention of moving to Lenoir because she planned to take a settlement payment or sell after receiving a grant. Her assertion that she had merely told them that her chance of prevailing was slim and that the proceeding would not be resolved soon is squarely belied, moreover, by testimony of Thorne and Gurley that they had pointedly asked her what she would do if she *did* get the grant and that she had replied that in that event she would sell the station. Tr. at 359-60, 377-78, 659, 702.

11. Ochoa argues that the testimony of those four witnesses is not to be believed because the record shows that they are biassed against her. We conclude, however, that this contention is ill-founded. She asserts that the record shows that Sue Litaker disliked her. In fact, the evidence merely shows that Litaker had a poor opinion of Ochoa's performance as sales manager. Tr. at 749-51, 765-66, 768-69, 842. Whatever her feelings toward Ochoa may have been, moreover, Litaker evidently had no burning desire to testify against her; she appeared under compulsion of subpoena after having refused to testify voluntarily. Tr. at 780. Ochoa stresses that Rita Thorne "fired" her. The record shows that Thorne demoted Ochoa, prompting her to resign, which Ochoa may have resented but which did not give *Thorne* any clear cause to bear a grudge, and the weight of the evidence indicates that Thorne demoted Ochoa because she was dissatisfied with her performance rather than for a spiteful motive. Tr. at 121, 361-62. Moreover, Thorne, like Litaker, refused until compelled by subpoena to cooperate with counsel who solicited her testimony as a witness against Ochoa. Tr. at 376-77, 380. Ochoa asserts that Edward Jablonski disliked her, that she had tried to get him fired, and that she had prevailed upon Gurley, then the general manager, to cut Jablonski's salary in half. Ochoa cites no evidence, though, that Jablonski knew that she had asked anyone to fire him, and Jablonski and Gurley testified that the salary cut was accompanied by a raise in Jablonski's commission rate and that Jablonski expected to realize an increase in total income as a result. Tr. at 614, 713. Finally, Ochoa asserts that Gurley had been fired six months before the hearing because she had accused him of sexual harassment. In fact, there is no evidence that Gurley was fired or that Ochoa accused him of sexual harassment. The record merely shows that she threatened to sue him for "harassment and hostile environment" after he had asked her to resign or accept a demotion and that Gurley himself subsequently resigned after being denied permission to fire her. Tr. at 689-90, 986-89. Gurley testified that he had previously decided that he would leave the company and that the falling-out with Ochoa had merely brought matters to a head, that he did not regret having given up his former position at WMXC, that he had recently praised Ochoa in conversation with her current employer, that although he no longer liked her he bore her no ill-will, and that his testimony was not skewed because of his feelings about her. Tr. at 718-19.

12. In sum, there is no persuasive evidence that Litaker or Thorne had any serious motive for bearing false witness against Ochoa, and, although Jablonski and Gurley may harbor some ill-feeling toward her as a result of past antagonism in the course of their employment at WMXC, their detailed testimony on point is facially credible and is materially corroborated by Litaker's and Thorne's. There is no reason to conclude here that four mutually-corroborative witnesses with little or no apparent motive for lying all perjured themselves in testimony that the ALJ found credible when the only evidence at odds with their sworn statements is equivocal and uncorroborated testimony from a witness who had a strong self-serving motive for contradicting them and who did not herself accuse them of lying when asked to account for the disrepancies between their testimony and hers but instead offered an implausible explanation that they had misunderstood her.

13. Aside from alleging bias, Ochoa grasps at other straws in her attempt to discredit the impeaching testimony. She asserts, citing the record, that Gurley's memory is admittedly poor, that he had no written record of his pertinent conversations with Ochoa, that his affidavit in evidence was not drafted by him but by an attorney who is a principal of another applicant, and that the affidavit was admittedly inaccurate. None of the evidence to which Ochoa thus refers is materially significant. The only acknowledged inaccuracy in the affidavit is an immaterial mis-dating of an event that it mentions. Although Gurley admitted that the affidavit was not of his own composition, he said that he had reviewed it carefully before signing it and that it was correct except for that one inaccuracy. Tr. at 666, 668-69, 671. Gurley admitted that he had a poor memory for dates, but said that he had no particular difficulty in recalling events. Tr. at 668-69. There is no indication that his testimony on crucial points, which is distinct and unequivocal, was skewed by faulty recollection.

14. Ochoa asserts that Sue Litaker conceded, at Tr. 748, that she had "never" heard Ochoa say that she hoped to make money from a settlement. This distorts the record. What Litaker actually says at Tr. 748 is merely that she had not heard such a remark on one particular occasion, and she says at Tr. 744-45 that she did hear Ochoa make such remarks on two other occasions.

15. Ochoa alleges, citing Tr. at 603-07, that Jablonski conceded that Ochoa had not explicitly stated her intentions to him and that he had merely gathered an impression about them. But the concession refers to only one of two conversations with Ochoa that Jablonski mentioned, and he testified that she had explicitly told him in the other conversation that she did not intend to move to Lenoir. Tr. at 604, 606, 618. Ochoa asserts that Jablonski denied that he had ever talked to Gurley about Ochoa's Lenoir application or that he knew how Gurley might testify, but that Gurley's testimony belies these denials. Here, again, Ochoa distorts the record. Jablonski did not deny having mentioned Ochoa's application in conversations with Gurley; on the contrary, he said that they had talked about it in two instances but had not discussed its details, Tr. at 637, and his testimony in this respect is fully consistent with Gurley's. Jablonski's testimony to the effect that he did not know, when he told Gurley that Rita Thorne had been subpoenaed to testify in this case, what relevant information Gurley might have to impart is also consistent with Gurley's testimony. Tr. at 640, 672-74.

16. Ochoa asserts that Rita Thorne's testimony is self-contradictory and inconclusive, but the hearing transcript discloses that these assertions are baseless. Ochoa further contends that Thorne gave false testimony, noting that she said that she had not talked to Gurley about Ochoa's activities as a WMXC employee, whereas Gurley testified that they had discussed that subject in one instance; Ochoa insinuates, moreover, that Thorne's testimony in this regard is further impeached by testimony by Jablonski and Gurley that Thorne had asked Jablonski to tell Gurley that she had been asked to testify against Ochoa. The portions of the record that the appellant cites as support for the latter assertion do not record any testimony to the effect that Thorne had asked Jablonski to tell Gurley anything, however, and the noted inconsistency between Thorne's testimony and Gurley's about a peripheral detail doesn't undermine their credibility.

17. Finally, Ochoa contends that reversible error was committed when the ALJ denied a motion by her attorney for issuance of a subpoena to compel testimony from Vanessa Key, another WMXC employee. We do not agree that the denial of this motion was reversible error, as Ochoa made no showing that Key could provide material evidence that could not be adduced from one of the nine other witnesses that appeared at the rebuttal session. See FCC 91M-1475, released April 26, 1991 and Tr. at 783.

18. ACCORDINGLY, IT IS ORDERED that the application for review filed by Maria M. Ochoa on November 12, 1992 and Ochoa's strike motions filed on December 10 and 21, 1992 ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: May 10, 1993

COMMENTS INVITED ON COMMUNIQUE TELECOMMUNICATIONS, INC.'S PETITION FOR DECLARATORY RULING AND INTERIM RELIEF

On April 21, 1993, Communique Telecommunications, Inc., d/b/a LOGICALL ("CTI"), filed a Petition for a Declaratory Ruling and Interim Relief against the National Exchange Carrier Association ("NECA") and the local exchange carriers ("LECs") providing interstate access to CTI. CTI seeks Commission declaration that NECA is without statutory or other authority to bill and collect from CTI the Universal Service Fund ("USF") and Lifeline Assistance ("LA") charges contained in NECA's Tariff F.C.C. No. 5. CTI also asks the Commission to rule that NECA's member LECs may not disconnect or otherwise interfere with the provisioning of local access services to CTI while the lawfulness of NECA's tariffing, billing and collecting of USF/LA charges under Part 69 of the Commission's rules is determined.

Interested parties may file comments to the petition no later than **June 21, 1993.** Replies to the comments may be filed no later than **July 12, 1993.**

Comments and replies regarding the petition for Declaratory Ruling and Interim Relief should reference file number AAD 93-45. An original and four copies of all comments and replies must be filed in accordance with Section 1.51(c) of the Commission's rules, 47 C.F.R. §1.51(c). All comments and replies in this proceeding should be filed with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. Additionally, one copy of each pleading must be filed with the Commission's duplicating contractor, International Transcription Service, Inc. ("ITS"), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Finally, a copy of each filing should be sent to Jane E. Jackson, FCC, Common Carrier Bureau, 2000 L Street, N.W., Suite 257, Washington, D.C. 20554. Copies of the Petition for Declaratory Ruling and Interim Relief may be obtained from ITS at (202) 857-3800.

We will treat the CTI Petition as a non-restricted proceeding for purpose of the Commission's *ex parte* rules. Thus, *ex parte* presentations are permitted, except during any Sunshine Agenda period, provided they are disclosed as described in the Commission's rules. *See* 47 C.F.R. §§ 1.1202, 1.1203 and 1.1206. For further information contact Jane E. Jackson at (202) 632-7500.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Applications of

Baypoint TV, Inc. File Nos. 1215-CM-P-83 and 1233-CM-P-83

For Authority to Construct and Operate a Multichannel Multipoint Distribution Service station on the F-group channels at Demopolis, Alabama and Jefferson City, Missouri

ORDER ON RECONSIDERATION

Adopted: April 30, 1993; Released: May 11, 1993

By the Chief, Domestic Facilities Division:

1. *Introduction.* Baypoint TV, Inc. (Baypoint) filed petitions for reconsideration of the dismissals by the Domestic Facilities Division (Division) on delegated authority of its applications for authority to construct and operate Multichannel Multipoint Distribution Service (MMDS) stations on the F-group channels at Demopolis, Alabama and Jefferson City, Missouri.

2. *Background.* As the result of Commission lotteries, the above-referenced applications were selected for qualification review. Subsequently, Division staff initiated qualification review of the applications, pursuant to 47 C.F.R. Sec. 21.32. Upon examination, the applications were found to contain several deficiencies that precluded the staff from making a finding that Baypoint was legally, technically, financially, and otherwise qualified to be a licensee, and that a grant of its applications would serve the public interest. Baypoint was notified by separate letters of these deficiencies and provided an opportunity to cure them within thirty (30) days of the date of each letter.[1] Baypoint was also advised in the deficiency letters that failure to file the requested information within thirty days could result in the dismissal of its applications.

3. With regard to its Demopolis application, almost sixteen (16) months after Baypoint had been notified of these deficiencies, it had provided none of the requested information. With regard to its Jefferson City application, almost nine (9) months after Baypoint had been notified of these deficiencies, it had provided only a partial response. Pursuant to Sections 21.13(c), 21.20(d), and 21.28(d), the Division dismissed Baypoint's applications for failure to comply completely in a timely manner with the Division's request for information. On reconsideration, Baypoint argues that the Demopolis application should be reinstated because: (1) the failure to respond was unintentional and resulted from a file being misplaced, and (2) a partial response has now been filed. Baypoint also argues that the Jefferson city application should be reinstated because: (1) the dismissal letter incorrectly stated that no response had been made, (2) a request for an extension of time had been filed, (3) a partial response had been filed, and (4) substantial compliance was achieved prior to the date on which the dismissal letter was received.

4. *Discussion.* As of the date of the Division's dismissal action, Baypoint still had not submitted all of the information necessary for evaluation of its qualifications to be an MMDS licensee. For example, Baypoint had not submitted a lease, lease option agreement, or other "concrete evidence" to demonstrate the availability of its proposed transmitter site, as required by Sec. 21.15(a).[2] For MMDS applications subject to the Commission's lottery proceedings, a demonstration of reasonable assurance of site availability is sufficient prior to the lottery. However, once the lottery is held, a fully-executed lease, lease option agreement, or other concrete evidence of site availability must be submitted.[3]

5. In addition, Baypoint failed to comply with the request to submit the Section 21.902(i) ITFS interference analysis. At the time of the dismissal, Section 21.902(i) required MMDS applicants to submit, prior to receiving construction authorization, and at such time as the Commission requested it, an analysis demonstrating that the proposed MMDS facilities would not cause harmful interference to existing cochannel or adjacent-channel ITFS stations within 50 miles of the MMDS station's proposed transmitter site, or alternatively, a consent statement from the ITFS licensee. By the express language of this rule, an MMDS applicant must submit an ITFS interference analysis at such time as the Commission requests it. Despite the specific request that this analysis be submitted by a specified date, Baypoint failed to do so. *See Fortuna Systems Corp.*, 3 FCC Rcd 5122, 5123 (Comm. Car. Bur. 1988).

6. Baypoint had a duty to submit curative amendments to both applications within thirty days of the Division's written request, or to obtain an extension of time.[4] *Vision-Aire, Inc.*, 5 FCC Rcd 1952 (Comm. Car. Bur. 1990). Its

[1] Some of the deficiencies cited in each letter were the absence of: (1) a lease or lease option agreement, pursuant to 47 C.F.R. Sec. 21.15(a); (2) current financial qualification data, pursuant to 47 C.F.R. Sec. 21.17; (3) an Instructional Television Fixed Service (ITFS) interference analysis, pursuant to 47 C.F.R. Sec. 21.902(i); and (4) proposed services and rates, as required by Item 29 of FCC Form 435.

[2] Even if Baypoint was not required to comply with the requirements of Section 21.15(a), it was required, pursuant to 47 C.F.R. Sec. 21.13(c), to submit a lease or lease option agreement after the Division directed it to do so. Section 21.13(a) provides, *inter alia:* "In addition to the general application requirements of Secs. 21.13 through 21.17 of this part, applicants shall submit any additional documents, exhibits, or signed written statements of fact: ... (2) As the Commission, at any time after the filing of an application ... may require from any applicant ... to enable it to determine whether a radio authorization should be granted...."

[3] *Revision of Part 21 of The Commission's Rules*, 2 FCC Rcd 5713, 5721 (1987) (Where there is a lottery "it shall be sufficient if the application adequately demonstrates reasonable assurance of the availability of the site. A license will not be granted, however, until concrete evidence of site availability is submitted." *Id.*).

[4] Baypoint states that it requested an extension of time to respond to the Jefferson City deficiency letter. However, the Division's files contain no record of such a request and Baypoint has failed to provide a copy of this request, to indicate how long an extension was requested, or to state whether the extension was granted. Furthermore, almost nine months after

failure to correct the defects in its applications for almost sixteen months (Demopolis) and almost nine months (Jefferson City) substantially impeded the expeditious offering of MMDS at Demopolis and Jefferson City. Also, Baypoint's failure to respond in a timely manner to the Division's request for information hindered the discharge of the Commission's statutorily-imposed duties under Title III of the Communication's Act. *By Direction of the Commission Letter to US West,* 60 Rad. Reg. 2d 8, 9 (1985). At the time of the dismissal, Baypoint had not provided the required interference analysis and the required lease or lease option agreement. The Division was not in a position, therefore, to complete evaluation of Baypoint's MMDS station proposals and its qualifications to be an MMDS licensee. *Multi-Point Television Distributors, Inc.,* 5 FCC Rcd 519, 520 (Comm. Car. Bur. 1990).

7. *Conclusion and Ordering Clause.* Having carefully considered all of the arguments and evidence presented, we find that dismissal of these applications for failure to comply with the Division's request for information was proper, reconsideration of the action is not warranted, and reinstatement of the applications is not justified. Accordingly, IT IS ORDERED that the petitions for reconsideration filed by Baypoint TV, Inc. regarding the above-referenced MMDS applications ARE DENIED. This order is issued pursuant to 47 C.F.R. Sec. 0.291, and is effective on its release date. *See* 47 C.F.R. Secs. 1.4(b), 1.106, and 1.115.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

the deficiency letter was issued Baypoint still had not provided all of the requested information. Under these circumstances, Baypoint's argument that it requested an extension of time is not sufficient to justify reinstatement of the Jefferson City application.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

Baypoint TV, Inc. File No. 1192-CM-P-83

For Authority to Construct
and Operate a Multichannel
Multipoint Distribution
Service station on the F-group
channels at Amarillo, Texas

ORDER ON RECONSIDERATION

Adopted: April 30, 1993; Released: May 11, 1993

By the Chief, Domestic Facilities Division:

1. *Introduction.* Baypoint TV, Inc. (Baypoint) filed a petition for reconsideration of the dismissal by the Domestic Facilities Division (Division) on delegated authority of its application for authority to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the F-group channels at Amarillo, Texas.

2. *Background.* As the result of a Commission lottery, the above-referenced application was selected for qualification review. Subsequently, Division staff initiated qualification review of the application, pursuant to 47 C.F.R. Sec. 21.32. Upon examination, the application was found to contain several deficiencies that precluded the staff from making a finding that Baypoint was legally, technically, financially, and otherwise qualified to be a licensee, and that a grant of its application would serve the public interest. Baypoint was notified by letter of these deficiencies and provided an opportunity to cure them within thirty (30) days of the date of the letter.[1] Baypoint was also advised in the deficiency letter that failure to file the requested information within thirty days could result in the dismissal of its application.

3. After requesting an extension of time, Baypoint failed to provide all of the information necessary to complete processing of its application. Pursuant to Sections 21.13(c), 21.20(d), and 21.28(d), the Division dismissed Baypoint's applications for failure to comply completely in a timely manner with the Division's request for information. Baypoint argues that its application should be reinstated because: (1) the dismissal letter incorrectly assumed that no action had been taken since the extension request, (2) a partial response had been filed, (3) the Division was advised that further amendments would be filed, and (4) the Division's requirements have now been fully met.

4. *Discussion.* As of the date of the Division's dismissal action, Baypoint still had not submitted all of the information necessary for evaluation of its qualifications to be an MMDS licensee. In particular, Baypoint had not submitted a lease, lease option agreement, or other "concrete evidence" to demonstrate the availability of its proposed transmitter site, as required by Sec. 21.15(a).[2] For MMDS applications subject to the Commission's lottery proceedings, a demonstration of reasonable assurance of site availability is sufficient prior to the lottery. However, once the lottery is held, a fully-executed lease, lease option agreement, or other concrete evidence of site availability must be submitted.[3]

5. Baypoint had a duty to submit curative amendments to its application within thirty days of the Division's written request, or to obtain an extension of time.[4] *VisionAire, Inc.*, 5 FCC Rcd 1952 (Comm. Car. Bur. 1990). Its failure to submit curative amendments substantially impeded the expeditious offering of MMDS at Amarillo. Also, Baypoint's failure to respond in a timely manner to the Division's request for information hindered the discharge of the Commission's statutorily-imposed duties under Title III of the Communication's Act. *By Direction of the Commission Letter to US West*, 60 Rad. Reg. 2d 8, 9 (1985). At the time of the dismissal, Baypoint had not provided the required lease or lease option agreement. The Division was not in a position, therefore, to complete evaluation of Baypoint's MMDS station proposal and its qualifications to be an MMDS licensee. *Multi-Point Television Distributors, Inc.*, 5 FCC Rcd 519, 520 (Comm. Car. Bur. 1990).

6. *Conclusion and Ordering Clause.* Having carefully considered all of the arguments and evidence presented, we find that dismissal of this application for failure to comply with the Division's request for information was proper, reconsideration of the action is not warranted, and reinstatement of the application is not justified. Accordingly, IT IS ORDERED that the petition for reconsideration filed by Baypoint TV, Inc. regarding the above-referenced MMDS application IS DENIED. This order is issued pursuant to 47 C.F.R. Sec. 0.291, and is effective on its release date. *See* 47 C.F.R. Secs. 1.4(b), 1.106, and 1.115.

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[1] Some of the deficiencies cited were the absence of: (1) a lease or lease option agreement, pursuant to 47 C.F.R. Sec. 21.15(a); (2) certification of financial qualifications, pursuant to 47 C.F.R. Sec. 21.17; (3) an Instructional Television Fixed Service (ITFS) interference analysis, pursuant to 47 C.F.R. Sec. 21.902(i); (4) a non-affiliation statement, pursuant to 47 C.F.R. Sec. 21.900; and (5) proposed services and rates, as required by Item 29 of FCC Form 435.

[2] Even if Baypoint was not required to comply with the requirements of Section 21.15(a), it was required, pursuant to 47 C.F.R. Sec. 21.13(c), to submit a lease or lease option agreement after the Division directed it to do so. Section 21.13(a) provides, *inter alia:* "In addition to the general application requirements of Secs. 21.13 through 21.17 of this part, applicants shall submit any additional documents, exhibits, or signed written statements of fact: ... (2) As the Commission, at any time after the filing of an application ... may require from any applicant ... to enable it to determine whether a radio authorization should be granted...."

[3] *Revision of Part 21 of The Commission's Rules*, 2 FCC Rcd 5713, 5721 (1987) (Where there is a lottery "it shall be sufficient if the application adequately demonstrates reasonable assurance of the availability of the site. A license will not be granted, however, until concrete evidence of site availability is submitted." *Id.*).

[4] Baypoint was granted a sixty (60) day extension of time. This time period expired approximately five (5) weeks prior to dismissal.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

Virginia Communications, Inc. — File No. 15307-CM-P-83

For Authority to Construct and Operate a Multichannel Multipoint Distribution Service station on the E-group channels at Kennewick, Washington

ORDER ON RECONSIDERATION

Adopted: April 30, 1993; Released: May 11, 1993

By the Chief, Domestic Facilities Division:

1. *Introduction.* After the dismissal by the Domestic Facilities Division (Division) on delegated authority of its application for authority to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the E-group channels at Kennewick, Washington, Virginia Communications, Inc. (Virginia) filed an informal request for reinstatement of its application.

2. *Background.* As the result of a Commission lottery, the above-referenced application was selected for qualification review. Subsequently, Division staff initiated qualification review of the application, pursuant to 47 C.F.R. Sec. 21.32. Upon examination, the application was found to contain several deficiencies that precluded the staff from making a finding that Virginia was legally, technically, financially, and otherwise qualified to be a licensee, and that a grant of its application would serve the public interest. Virginia was notified by letter of these deficiencies and provided an opportunity to cure them within thirty (30) days of the date of the letter.[1] In the deficiency letter, Virginia was also advised that failure to file the requested information within thirty days could result in the dismissal of its application.

3. Virginia did not respond to the deficiency letter. Pursuant to Sections 21.13(c), 21.20(d) and 21.28(d), the Division dismissed Virginia's application for failure to comply completely in a timely manner with the Division's request for information. In its reinstatement request, Virginia argues that the Division failed to consider an amendment, filed prior to the date of the deficiency letter, which provided most of the requested information. However, Virginia acknowledges that this amendment did not include a copy of a lease agreement, one of the items requested. Virginia submitted a lease option agreement in a second amendment filed approximately two years after the application was dismissed. Virginia states that it has now fully complied with the Division's requirements, that it is prepared to construct and operate the system, and that reinstatement of its application will serve the public interest by avoiding further delay.

4. *Discussion.* As of the date of the Division's dismissal action, Virginia still had not submitted all of the information necessary for evaluation of its qualifications to be an MMDS licensee. In particular, Virginia had not submitted a lease, lease option agreement, or other "concrete evidence" to demonstrate the availability of its proposed transmitter site, as required by Sec. 21.15(a).[2] For MMDS applications subject to the Commission's lottery proceedings, a demonstration of reasonable assurance of site availability is sufficient prior to the lottery. However, once the lottery is held, a fully-executed lease, lease option agreement, or other concrete evidence of site availability must be submitted.[3]

5. Virginia had a duty to submit a curative amendment to its application within thirty days of the Division's written request, or to obtain an extension of time. *VisionAire, Inc.*, 5 FCC Rcd 1952 (Comm. Car. Bur. 1990). Its failure to submit a curative amendment for two and one-half years substantially impeded the expeditious offering of MMDS at Kennewick. Also, Virginia's failure to respond in a timely manner to the Division's request for information hindered the discharge of the Commission's statutorily-imposed duties under Title III of the Communication's Act. *By Direction of the Commission Letter to US West*, 60 Rad. Reg. 2d 8, 9 (1985). At the time of the dismissal, Virginia had not provided the required lease or lease option agreement. The Division was not in a position, therefore, to complete evaluation of Virginia's MMDS station proposal and its qualifications to be an MMDS licensee. *Multi-Point Television Distributors, Inc.*, 5 FCC Rcd 519, 520 (Comm. Car. Bur. 1990).

6. *Conclusion and Ordering Clause.* Having carefully considered all of the arguments and evidence presented, we find that dismissal of this application for failure to comply with the Division's request for information was proper, and reinstatement of the application is not justified. Accord-

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[1] Some of the deficiencies cited were the absence of: (1) a lease or lease option agreement, pursuant to 47 C.F.R. Sec. 21.15(a); (2) current financial qualification data, pursuant to 47 C.F.R. Sec. 21.17; (3) an Instructional Television Fixed Service (ITFS) interference analysis, pursuant to 47 C.F.R. Sec. 21.902(i); (4) an interference showing, pursuant to 47 C.F.R. Sec. 21.901(d)(7); (5) a non-affiliation statement, pursuant to 47 C.F.R. Sec. 21.900; (6) a tariff exhibit, as required by Item 29 of FCC Form 435; and (7) answers to questions on pages 5, 6 and 7 of FCC Form 435.

[2] Even if Virginia was not required to comply with the requirements of Section 21.15(a), it was required, pursuant to 47 C.F.R. Sec. 21.13(c), to submit a lease or lease option agreement after the Division directed it to do so. Section 21.13(c) provides, *inter alia:* "In addition to the general application requirements of Secs. 21.13 through 21.17 of this part, applicants shall submit any additional documents, exhibits, or signed written statements of fact: ... (2) As the Commission, at any time after the filing of an application ... may require from any applicant ... to enable it to determine whether a radio authorization should be granted...."

[3] *Revision of Part 21 of The Commission's Rules*, 2 FCC Rcd 5713, 5721 (1987) (Where there is a lottery "it shall be sufficient if the application adequately demonstrates reasonable assurance of the availability of the site. A license will not be granted, however, until concrete evidence of site availability is submitted." *Id.*).

ingly, IT IS ORDERED that the request for reinstatement filed by Virginia Communications, Inc. regarding the above-referenced MMDS application IS DENIED. This order is issued pursuant to 47 C.F.R. Sec. 0.291, and is effective on its release date. *See* 47 C.F.R. Secs. 1.4(b), 1.106, and 1.115.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Authorization of

Line of Site, Inc. File No. 7108-CM-P-83

To Construct and Operate Multichannel
Multipoint Distribution Service station
WMH512 at Globe, Arizona

ORDER ON RECONSIDERATION

Adopted: April 30, 1993; Released: May 11, 1993

By the Chief, Domestic Facilities Division:

1. *Introduction.* Line of Site, Inc. (Line) filed a petition for reconsideration requesting reinstatement of its conditional license for Multichannel Multipoint Distribution Service (MMDS) station WMH512 on the E-group channels at Globe, Arizona.

2. *Background.* Line's application was filed with several deficiencies. In response to a deficiency letter, Line submitted some, but not all, of the information necessary to cure specified deficiencies. In order to afford Line yet another opportunity to cure deficiencies which it failed to cure during the pendency of its application, four (4) specific express conditions were imposed on Line's conditional license, stipulating the submission of specified documents by a prescribed date. The following language appeared on the face of Line's conditional license:

> Failure to comply exactly and completely with the following conditions will result in automatic forfeiture of this authorization on Nov 16, 1991.
>
> Prior to construction commencement, and no later than Nov 15, 1991, each of the following documents must be filed at the FCC:
>
> A fully-executed deed, lease or option agreement.
>
> A fully-executed financial certification per 47 CFR Sec. 21.17.
>
> A public interest statement per 47 CFR Sec. 21.17. An analysis demonstrating no harmful interference to licensed ITFS receive sites per 47 C.F.R. Secs. 21.901 & 21.902.

None of the four specified documents were filed on or before the prescribed date of November 15, 1991. Line argues on reconsideration that reinstatement would be in the public interest because: (1) thirty (30) days after forfeiture, Line filed the specified documents; (2) the documents had not been filed in a timely manner through inadvertence by its consultant; (3) with its documents, Line requested that the filing deadline be waived; (4) "Line of Site has already constructed stations in Champaign, IL and Orlando, FL, and is committed to the development of the industry;" (5) "Line of Site and Multi-Micro have invested countless manhours and substantial money in the planning of a new Globe wireless cable system;" and (6) Line "believed that the required documentation had been forwarded to the Commission." Line's Petition at 1.

3. *Discussion.* The authorization issued to Line expressly stated that the four documents must be filed by a specified date. As of the date of forfeiture, Line had failed to comply with the four express conditions of its authorization. Therefore, Line forfeited its conditional license by operation of the express terms of its authorization. *See* 47 C.F.R. Sec. 21.44. In its reinstatement petition, Line admits that it failed to comply with these express conditions due to inadvertence by its consultant. Line's reliance on its consultant is not a mitigating factor. *Friendly Community Television Services,* 7 FCC Rcd 7892, 7893 (Dom. Fac. Div. 1992). Line is ultimately responsible for any lack of compliance with each of the terms and conditions of its authorization. *See Ronald F. Trinchitella,* 4 FCC Rcd 6360 (1989); *Bruce M. Schorsten,* 2 FCC Rcd 4409, 5422 n.3 (Comm. Car. Bur. 1987); *see also Digital Paging Systems, Inc.,* 2 FCC Rcd 1523, 1524 (Comm. Car. Bur. 1987). In its application, Line, through an officer, stated it was familiar with the Commission's rules relevant to MMDS. Line's failure to comply with the four express conditions cannot be used to avoid the consequences of its failure. Inadvertence in this instance is insufficient justification for reinstatement. *Fortuna Systems Corp.,* 3 FCC Rcd 5122, 5123 (Comm. Car. Bur. 1988).

4. Nevertheless, Section 21.44(b) of the Commission's Rules, 47 C.F.R. Sec. 21.44(b), provides "that a license forfeited ... may be reinstated if the Commission, in its discretion, determines that reinstatement would best serve the public interest, convenience and necessity." We note that Line filed each of the four documents within the reinstatement period, and that the interference analysis, once filed, stated that there were no Instructional Television Fixed Service (ITFS) licensees within 50 miles. Line has satisfied Sections 21.44(b)(2) and (b)(3) in that it has explained its failure to timely file the specified documents and states that it has adopted procedures to prevent future forfeitures for failure to comply with express conditions of its authorizations. We believe that the interests of the residents of Globe, Arizona would be served by reinstating Line's construction authorization as it has demonstrated its commitment to provide diverse video entertainment programming to the residents of that community.

5. *Conclusion.* Based on these considerations, we find that reinstatement of the above-referenced conditional license is justified.[1] Accordingly, IT IS ORDERED that the petition for reconsideration and reinstatement filed by Line of Site, Inc. regarding the above-referenced MMDS conditional license IS GRANTED and the construction au-

[1] In the same document in which it requests reconsideration, Line also requests a stay. A review of our records reveals that no new cochannel MMDS applications have been filed within 50 miles of Line's transmitter site after Line's forfeiture through the imposition of the filing freeze on April 9, 1992. Due to our grant of Line's reconsideration request, we hereby dismiss its request for stay as moot.

thorization for MMDS station WMH512 is reinstated.[2] This order is issued pursuant to 47 C.F.R. Sec. 0.291, and is effective on its release date. *See* 47 C.F.R. Secs. 1.4(b), 1.106, and 1.115.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

[2] Line may wish to file an extension application, FCC Form 701, with the appropriate filing fee of $110, for our consideration of the duration of any second construction period.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

Philadelphia MDS Company — File No. 52322-CM-MP-90

For Authority to Construct
and Operate a Multipoint
Distribution Service
station WLK231 on Channel 2
at Philadelphia, Pennsylvania

MEMORANDUM OPINION AND ORDER

Adopted: April 23, 1993; Released: May 11, 1993

By the Commission:

1. *Introduction.* Philadelphia MDS Company (Philadelphia) filed an application for review challenging the denial by the Domestic Facilities Division (Division) on delegated authority of a request for an extension of time to construct Multipoint Distribution Service (MDS) station WLK231 on Channel 2 at Philadelphia, Pennsylvania.

2. *Background.* During its initial construction period, Philadelphia filed an extension application (FCC Form 701, File No. 50058-CM-MP-87), requesting additional time to construct because it had not yet obtained a lease for a transmitter site. The decision granting this extension application specifically stated that Philadelphia must obtain a lease and complete construction on or before the day the second construction period expired (Letter to Philadelphia MDS Co. from Domestic Facilities Division Chief, dated May 11, 1987). However, Philadelphia did not obtain a lease, did not complete construction, and did not file an extension application before the end of this second construction period. Instead, approximately 32 days before the expiration of this second construction period,[1] Philadelphia filed a modification application (File No. 50108-CM-MP-87) to change its transmitter location, explaining that it had failed to obtain a lease for its transmitter site.[2]

3. *Extension Denial.* In denying Philadelphia's latest extension application, the Division found that the modification application failed to make a specific request for an extension of time as required by 47 C.F.R. Sec. 21.11(b),[3] the extension application was late-filed, and the extension rule prohibited the grant of an extension application for loss of site availability. The Division also noted that the filing of the modification application was insufficient justification for the grant of an extension of time to construct because it was unacceptable for filing. Philadelphia failed to submit with its modification application required interference analyses, and failed to serve, as required,[4] the interference analyses. Within thirty (30) days of this extension denial, Philadelphia filed its application for review.[5]

4. *Discussion.* Philadelphia's application for review will be dismissed for failure to comply with the requirements of 47 C.F.R. Sec. 1.115(c), which provides: "No application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass." Philadelphia presented several questions of law and fact which the Division, as the designated authority that acted on the application has not been afforded an opportunity to consider.[6] The proper procedure, pursuant to 47 C.F.R. Sec. 1.106, would have been for Philadelphia to file a petition for reconsideration with the Division. *See* 47 C.F.R. Sec. 1.106. Therefore, Philadelphia's application for review is dismissed as procedurally defective.[7]

5. *Conclusion.* Accordingly, the application for review filed by Philadelphia MDS Company IS HEREBY DISMISSED as defective due to its failure to comply with the requirements of 47 C.F.R. Sec. 1.115(c). This order is issued pursuant to 47 C.F.R. Sec. 1.115, and is effective on its release date. *See* 47 C.F.R. Secs. 1.4(b) and 1.115.

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[1] More than 45 months after the expiration of its second construction period, Philadelphia filed another extension application.

[2] In the August 29, 1990 letter to W. Randolph Young, Attorney for Philadelphia MDS Co., the Domestic Facilities Division ruled that this modification application was unacceptable for filing as initially filed and had remained unacceptable for filing for over three (3) years.

[3] At the time this modification application was filed, the applicable language was found in 47 C.F.R. Sec. 21.11(b).

[4] Service was required on four MDS Channel 1 stations within 50 miles, located at Wilmington, Trenton, Allentown and Reading, and on any point-to-point station located within 50 miles authorized at 2160-2162 MHz.

[5] Philadelphia argues that the extension application was not filed late because it was not necessary to file an extension application, that it did not have to request an extension of time to construct the modification as required by the rule because it had stated "4 months" as an estimated period of construction, that the Division was required to grant an extension of time to construct for loss of site availability despite the rule language to the contrary, and that it was irrelevant that the modification application was unacceptable for filing.

[6] These questions are: (1) whether the words "4 months" was adequate compliance with the requirement in 47 C.F.R. Sec. 21.11 that Philadelphia must "request... in FCC Form ... 435 additional time to construct;" (2) whether, pursuant to the language of 47 C.F.R. Sec. 21.40(b) that "[n]o application ... to extend a license construction period will be granted for delays caused by ... lack of site availability," the Division lacked authority to deny an extension request based on lack of site availability; (3) whether Philadelphia is exempt from the Commission's policy enunciated in *Revision of Part 21 of The Commission's Rules*, 2 FCC Rcd 5713 (1987), that any modification must be completed during the initial construction period; and (4) whether Philadelphia's extension request was required to demonstrate, as stated at 47 C.F.R. Sec. 21.40(b), "that the licensee has made diligent efforts to construct the facilities" and that "additional time is required due to circumstances beyond the applicant's control."

[7] Because we dispose of Philadelphia's application for review on procedural grounds, we need not reach the arguments raised by Philadelphia in its pleading.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Metromedia Company File No. I-T-C-93-085-TC

Application for authority pursuant to Section 214 of the Communications Act of 1934, as amended, for *pro forma* assignment of authorizations of Metromedia Communications Corporation to resell international switched voice services and to provide direct service between the United States, Canada and the Commonwealth of Independent States

Resurgens Communications Group, Inc. File No. I-T-C-93-088-TC
Transferor,

and

Metromedia Company
Transferee,

Application for Transfer of Control of International Resale Authorizations of Com Systems, Inc. pursuant to Section 214 of the Communications Act of 1934, as amended

MEMORANDUM, OPINION AND ORDER

Adopted: May 3, 1993; Released: May 11, 1993

By the Chief, International Facilities Division:

1. On January 25, 1993, Metromedia Company (Metromedia) and Resurgens Communications Group, Inc. (Resurgens) filed the above-captioned applications pursuant to Section 214 of the Communications Act of 1934, as amended, and Section 63.01 of the Commission's Rules requesting authority for (1) the *pro forma* assignment of the international Section 214 authorizations held by Metromedia Communications Corporation (MCC) to Resurgens, and (2) the transfer of control of the international Section 214 authorizations held by Com Systems, Inc. (CSI), from Resurgens to Metromedia. The second above-captioned application (File No. I-T-C-93-088-TC) was placed on public notice on February 3, 1993 and no comments were received.

2. Metromedia is a Delaware general partnership. Metromedia, through its subsidiary MCC, provides international switched voice services on a direct facilities basis to Canada and the Commonwealth of Independent States, and by reselling the switched voice services of AT&T, MCI, US Sprint, Allnet and Satellite Business Systems.[1]

3. Resurgens is a Georgia corporation. Resurgens is a publicly owned telecommunications holding company whose stock is traded on the American Stock Exchange. Through its wholly-owned subsidiary CSI, Resurgens provides international switched voice services between the U.S., Hawaii, Puerto Rico and the Virgin Islands on the one hand, and Canada and various overseas points on the other hand, by reselling the switched voice services of AT&T, MCI, US Sprint and Satellite Business Systems.[2] Both Metromedia and Resurgens provide international service under the regulatory requirements established for non-dominant international carriers in *International Competitive Carrier Policies*.[3]

4. The transfer of control will take place pursuant to a merger of MCC into Resurgens, coupled with the acquisition of a controlling equity and voting stake in Resurgens by Metromedia. Under the merger agreement, MCC will be merged into Resurgens and its stock converted into a right to receive cash plus shares of Resurgens Class A stock. Metromedia will hold 100% of the issued and outstanding Class A shares, which carry a right to cast 8 votes per share. The outstanding common stock permits one vote per share. Upon closing, Metromedia will hold approximately 61% of the equity and 93% of the voting interest in Resurgens. Metromedia also will continue to hold notes and warrants convertible into additional shares of Resurgens Class A stock. Thereafter, Resurgens, the surviving entity in the merger, will change its name to Metromedia Communications Corporation. Thus, Resurgens will retain direct control of the CSI authorizations, and gain control of the MCC authorizations, but ultimate control will transfer to Metromedia.

5. The applicants state that a grant of these applications will serve the public interest. Metromedia will be able to assume a more viable ongoing presence in the market for international telecommunications services. By integrating its existing services with those of Resurgens, Metromedia will serve its customers throughout the country on a more efficient, cost-effective basis. This will benefit the public by

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[1] *Order, Authorization and Certificate*, I-T-C-86-022, Mimeo No. 2074, released January 22, 1986; *Order and Authorization*, I-T-C-86-148, 1 FCC Rcd 584 (1986); *Order, Authorization and Certificate*, I-T-C-88-045, 3 FCC Rcd 822 (1988); and *Order, Authorization and Certificate*, I-T-C-88-105, 3 FCC Rcd 4010 (1988). The Commission recently granted a *pro forma* transfer of control of these authorizations from MLD Holdings, Inc. to Metromedia. *See* Letter from George Li, Chief, International Facilities Division, to Marvin J. Diamond, Esq., dated December 29, 1992 (File No. I-T-C-93-057-TC).

[2] *See* Com Systems Inc., File No. I-T-C-87-042, 2 FCC Rcd 582 (1987); Com Systems, Inc., File No. I-T-C-87-069, 2 FCC Rcd 1782 (1987). The Commission has granted a transfer of control of these authorizations from CSI to Resurgens. *See* Com Systems, Inc., 6 FCC Rcd 5732 (1991).

[3] International Competitive Carrier Policies, 102 FCC 2d 812 (1985), *recon. denied*, 60 RR 2d 1435 (1986).

the introduction of more diverse services, as well as significant operating efficiencies and service quality improvements.

6. In view of the foregoing, we conclude that the assignment of the international Section 214 authorizations held by MCC to Resurgens, and the transfer of control of the international Section 214 authorizations held by CSI, from Resurgens to Metromedia will not adversely affect the public interest.

7. Accordingly, IT IS ORDERED, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, and Section 63.01 of the Commission's Rules, 47 C.F.R. § 63.01, that the application of Metromedia Company and Resurgens Communications Group, Inc., File No. I-T-C-93-088-TC, IS GRANTED and we consent to the transfer of control from Resurgens to Metromedia of the international Section 214 authorizations held by CSI, which were originally granted in File Nos. I-T-C-87-042 and I-T-C-87-069.

8. IT IS FURTHER ORDERED, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, and Section 63.01 of the Commission's Rules, 47 C.F.R. § 63.01, that the application of Metromedia Company, File No. I-T-C-93-085-TC IS GRANTED and we consent to the assignment from MCC to Resurgens of the international Section 214 authorizations originally granted in File Nos. I-T-C-86-022, I-T-C-86-148, I-T-C-88-045, and I-T-C-88-105. However, the grant of this application is contingent upon Metromedia Company first obtaining control of Resurgens Communications Group, Inc. If Metromedia fails to acquire Resurgens as outlined in Metromedia's application, then the assignment of these Section 214 authorizations is not authorized to occur.

9. IT IS FURTHER ORDERED, pursuant to Section 203 of the Communications Act, as amended, 47 U.S.C. § 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, that Resurgens and CSI must continue to maintain tariffs for the services authorized in this order.

10. IT IS FURTHER ORDERED that Resurgens and CSI must file annual reports of overseas telecommunications traffic as required by Section 43.61 of the Commission's Rules, 47 C.F.R. § 43.61.

11. IT IS FURTHER ORDERED that Resurgens is limited, under this order, to the provision of international switched voice services by the resale of the international switched voice services set forth in AT&T Tariff FCC No. 1, US Sprint Tariffs FCC No. 1 and 2, MCI Tariff FCC No. 1, Satellite Business Systems Tariff FCC No. 4, and Allnet Tariff FCC No. 1 between the United States and those points listed in the aforementioned tariffs in accordance with the above-captioned (*see* n.1).

12. IT IS FURTHER ORDERED that CSI is limited, under this order, to the provision of international switched voice services by the resale of the international switched voice services set forth in AT&T Tariffs FCC Nos. 1 and 2, MCI Tariff FCC No. 1, US Sprint Tariffs FCC Nos. 1 and 2, and Satellite Business Systems Tariff FCC No. 4 between the United States and those points listed in the aforementioned tariffs in accordance with the above-captioned (*see* n.2).

13. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services the applicants seek authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

14. This order is issued under Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules, 47 C.F.R. §§ 1.106, 1.115, may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2), 47 C.F.R. § 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Kenyon Sales and Marketing NAL/Acct. No. 315HF0015
1245 North Fitzgerald, Suite 101
Rialto, CA 92376

NOTICE OF APPARENT LIABILITY

Adopted: April 23, 1993; Released: May 6, 1993

By the Field Operations Bureau:

I. INTRODUCTION

1. This is a Notice of Apparent Liability for Monetary Forfeiture (NAL) issued pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. §503(b), (the Act), to Kenyon Sales and Marketing (Kenyon) for willful violation of Section 2.946 of the Commission's Rules, 47 C.F.R. §2.946. Kenyon was distributing alarm system equipment which lacked an FCC identifier (FCC ID). After receiving a complaint and a sample of the FLARE FL-23 device which was being distributed by Kenyon, the Commission's Columbia office wrote to Kenyon requesting information regarding authorization for the device, and asking Kenyon to submit a test sample of the device. Kenyon failed to respond to the request for information and also failed to submit the requested test sample.

2. The appropriate amount of forfeiture for this violations is $3,000.

II. BACKGROUND

3. On January 17, 1992, the Commission received a complaint that an alarm system --including two transmitters and a receiver-- being distributed by Kenyon were not labeled with an FCC ID as required by Section 15.101 of the Commission's Rules. (47 C.F.R. §15.101. Based on the complaint and supporting documentation, the Commission's Columbia office wrote to Kenyon requesting information regarding the device. The Columbia office also advised Kenyon of Act and rule requirements and sanctions for violating marketing rules.

4. Kenyon was instructed to submit a reply or statement within 30 days of receipt of the Notice. Kenyon was also asked to provide a test sample of the FLARE FL-23 pursuant to the Commission's authority under Section 2.946 of the Rules. The return receipt was signed for on March 6, 1992. Kenyon failed to respond by April 6, 1992, 30 days after receipt of the Notice. Furthermore, to date, Kenyon has failed to respond to the Commission's request for information or to comply with the request for a test sample.

III. DISCUSSION

5. The FLARE FL-23 alarm system marketed by Kenyon is a radiofrequency device requiring Commission approval prior to marketing. *See* 47 C.F.R. §§2.801, 2.803.

6. Section 2.946 of the Commission's Rules states that "[a]ny party ... who markets equipment subject to the provisions of [Chapter 47] shall provide test sample(s) or data upon request by the Commission." This provision also states that failure to comply with such requests within sixty days may subject the party to a forfeiture. In February 1992, after Commission staff examined one of Kenyon's FLARE FL-23s and found that neither the transmitters nor the receiver included in the system were labeled with the required FCC ID, Kenyon was sent a written request for information and a test sample. More than sixty (60) days have passed since the Commission's request. Kenyon has not responded nor submitted the requested test sample.

7. Pursuant to Section 503 of the Act, 47 U.S.C. §503, and our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *modified in part on recon.*, 7 FCC Rcd 5339 (1992), *petition for review panding sub nom. USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992) (*Policy Statement*), the base forfeiture for this violation is $3,000. No adjustments appear warranted.

IV. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act and Section 1.80 of the Commission's Rules, 47 C.F.R. §1.80, that Kenyon Sales and Marketing IS APPARENTLY LIABLE FOR A MONETARY FORFEITURE in the amount of $3,000 for failing to submit the test sample and information requested by the Commission in violation of Section 2.946 of the Commission's Rules.

9. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's Rules, 47 C.F.R. §1.80(f)(3), that Kenyon Sales and Marketing shall, within thirty (30) days of release of this Notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Forfeitures shall be paid by check or money order payable to the Federal Communications Commission.[1] Payment should be made by check or money order payable to the Federal Communications Commission, attention NAL/Acct. No. 315HF0015 and must be mailed to the following address:

Federal Communications Commission
P.O. Box 73482
Chicago, Illinois 60673-7482

Send written responses regarding why the forfeiture should be reduced or not imposed to:

[1] Claims of inability to pay should be supported by tax returns or other financial statements prepared by generally accepted accounting principles for the most recent 3 years.

Federal Communications Commission
Field Operations Bureau
Enforcement Division, AC/1500E3
1919 M Street, N.W.
Washington, DC 20554
ATTN: NAL Response

10. IT IS FURTHER ORDERED that this Notice of Apparent Liability for Monetary Forfeiture shall be sent by certified mail, return receipt requested, to Kenyon Sales and Marketing, 1245 North Fitzgerald, Suite 101, Rialto, CA 92376.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

TURNER INDEPENDENT SCHOOL DISTRICT
ST. JO, TX — File No. BPLIF-911007DB

GOLD-BURG INDEPENDENT SCHOOL DISTRICT
BOWIE, TX — File No. BPLIF-911008EE

SLIDELL INDEPENDENT SCHOOL DISTRICT
ROSSTON, TX — File No. BPLIF-910603DH

For Construction Permit and License in the Instructional Television Fixed Service on Channels G1, G2, G3, and G4

MEMORANDUM OPINION AND ORDER

Adopted: May 3, 1993; Released: May 12, 1993

By the Commission:

1. The Commission has before it for consideration the mutually exclusive applications of Turner Independent School District ("Turner"), Gold-Burg Independent School District ("Gold-Burg"), and Slidell Independent School District ("Slidell"), each seeking a license in the Instructional Television Fixed Service (ITFS) on channels G1-G4 in the area of St. Jo, Bowie, and Rosston, Texas, respectively.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of Turner, Gold-Burg, and Slidell. All three applicants are qualified to be ITFS licensees. They are governmental organizations engaged in the formal education of enrolled students: Turner is accredited by the Oklahoma State Department of Education, and Gold-Burg and Slidell are accredited by the Texas Education Agency. Although they all propose to serve students outside their districts, because they also propose to provide some formal educational programming to schools within their own districts, they qualify as local applicants.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive ITFS applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards predetermined merit points based on five criteria deemed to be most relevant to predicting the applicant best qualified to provide the service for which the ITFS spectrum has been established. *Instructional Television Fixed Service - Second Report and Order in MM Docket 83-523* (*Second Report and Order*), 101 FCC 2d 49, 65-72 (1985); 47 C.F.R. §74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[2] Fifth, one point is awarded to applicants which are existing E or F channel licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, Turner, Gold-Burg, and Slidell are awarded points based on the following criteria:

Localism. Each applicant is entitled to four points for being a governmental entity serving the formal educational needs of schools within its respective jurisdiction.

Accreditation. Each applicant, accredited by the Oklahoma State Department of Education or the Texas Education Agency, is entitled to three points for accreditation.

Four-Channel Limitation. None of the applicants is the licensee of, or has filed applications for, additional ITFS channels in the St. Jo, Bowie, and Rosston areas. Consequently, each is entitled to two points for remaining within the four-channel limitation.

Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a programming "grid." Where amounts and types of programming proposed in the schedule and in the grid are inconsistent, we shall consider as correct, for comparative purposes, the amount and type which result in the least number of points to the applicant, so long as the excess capacity lease permits that level of

[1] A "local" applicant is an institution or organization that is physically located in the community, or metropolitan area, where service is proposed. *Second Report and Order*, 101 FCC 2d at 59; 47 C.F.R. §74.932, Note 1.

[2] One point is awarded for a proposed schedule of at least 21 average hours per channel per week of formal educational programming or of at least 41 average hours per channel per week of other ITFS programming. Two points are awarded for a proposed schedule of at least 41 average hours per channel per week of formal educational programming or at least 61 hours per channel per week of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. §74.913(b)(4).

programming to be transmitted. *Hispanic Information and Telecommunications Network, Inc.*, 7 FCC Rcd 5924 (1992). Turner's illustrative schedule proposes an average of 11.5 hours of formal ITFS programming per channel per week, while its programming grid proposes an average of 11.75 hours of formal educational programming per channel per week. Because neither the schedule nor the grid establishes the threshold amount at which merit points are awarded, Turner is entitled to no programming merit points.

The illustrative schedule for Gold-Burg proposes an average of 20 hours of ITFS programming per channel per week; however, the schedule does not indicate which programs are formal educational. In contrast, its programming grid proposes an average of 20 hours of formal educational programming per channel per week. Because neither the schedule nor the grid establishes the threshold amount at which merit points are awarded, Gold-Burg is entitled to no programming merit points.

Slidell's illustrative schedule proposes an average of 24.375 hours of ITFS programming, but like its competitors, the schedule does not indicate which programs are formal educational. Accordingly, we will consider the programming on Slidell's schedule as nonformal for the purposes of determining merit points. *Valley View Independent School District*, 7 FCC Rcd 7228 (1992). Its programming grid proposes an average of 20 hours of formal educational programming per channel per week. Since the amount of programming proposed by this applicant does not reach the threshold at which merit points are awarded, Slidell is entitled to no programming merit points.

E- and F- Channel Group Relocations. None of the applicants is the current licensee of an E or F channel seeking to relocate to other channels; therefore, none is entitled to the one point for such applicants.

Total. Turner, Gold-Burg, and Slidell are each entitled to a total of nine points: four points for being local, three points for being accredited, and two points for observing the four-channel limitation. Because the applicants are tied, we must utilize our tie-breaker mechanism to determine the winning applicant.

TIE-BREAKER MECHANISM

5. When the comparative procedure results in a tie among two or more applicants, the parties are given 30 days from notification to negotiate an agreement regarding division of the use of channels. If no agreement is reached and advanced to the Commission within that time, the tentative selectee is determined through the tie-breaker mechanism detailed in *Instructional Television Fixed Service-Third Report and Order in MM Docket No. 83-523, (Third Report and Order)*, 4 FCC Rcd 4830 (1989), *Third Report and Order Reconsidered*, 5 FCC Rcd 945 (1990), and Section 74.913(d) of the Commission's Rules. This mechanism is based upon the submission by each applicant of the number of students at its proposed receive sites who are formally enrolled in classes for credit toward an academic degree or diploma or a legally required certification or license.[3] Each applicant then has 15 days to respond to any aspect of the enrollment submissions. Once this response period has expired, the Commission compares the figures to determine if any applicant's system reaches fewer than 80 percent as many students as another applicant's. If so, the application resulting in service to the fewer number of students is denied, and the remaining application is granted. If more than one applicant remains, the channels or channel capacity are evenly divided among the remaining applicants. Because the three applicants here did not reach an agreement regarding the use of the channels, we look to the enrollment figures submitted by each.

6. Although Turner included with its enrollment figures letters of intended use from receive sites outside of its jurisdiction, we cannot count the students from those sites because these letters were not filed prior to the "B" cut-off date of December 30, 1991. Nor can we accept the brief statements from receive sites submitted by Gold-Burg with its original application as being in compliance with our rules for letters of intended use. Those statements failed to include the information required by Section 74.932, Note 2, and therefore cannot form the basis for student enrollment figures. Specifically, none of Gold-Burg's receive site letters includes a statement that the applicant's program offerings have been previewed, nor is there any discussion in the letters of the types of programming and hours per week of formal and informal programming expected to be used at the site.[4] Finally, Slidell did not submit enrollment figures within the thirty-day time limit set in the letter sent to all three applicants on March 26, 1992, requesting enrollment figures, and did not respond to a further request for this information. Consequently, Slidell's application will be dismissed for failure to prosecute, in accordance with Section 73.3568(b) of our rules.

As a result, for each remaining applicant we will count enrolled students only at schools listed as receive sites that are within the applicants' respective jurisdictions. Accordingly, we credit Turner with 303 students and Gold-Burg with 109 students. Because the 109 students credited to Gold-Burg represent fewer than 80 percent of the total of Turner, Gold-Burg's application will be denied, and Turner will be authorized to operate facilities on channels G1-G4.

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[3] Only receive sites specified as of the "B" cut-off date may be used in determining the number of students served. *Third Report and Order Recon., supra.* Moreover, applicants serving students other than their own must have submitted letters, also by the "B" cut-off date, from those receive sites indicating an intention to use the proposed service. 47 C.F.R. §74.911(c); *Third Report and Order*, 4 FCC Rcd at 4832. Specifically, those letters, to be signed by the administrator or authority responsible for curriculum planning, must indicate that the applicant's programming offerings have been viewed and that such programming will be incorporated in the sites' curricula. Further, the letters should discuss the types and amounts of programming expected to be used and an indication of the extent to which representatives from the various sites will participate in the planning, scheduling, and production of the programming. 47 C.F.R. §74.932, Note 2.

[4] Gold-Burg's amendment of February 3, 1992 includes letters from receive sites which likewise do not conform to our requirements and which were untimely filed.

OTHER MATTERS

7. Turner proposes to lease its excess capacity for non-ITFS use, as permitted by Section 74.931. Turner has submitted a copy of its lease with Rural Wireless TV Company, Inc., but the lease fails to conform entirely to the Commission's requirements. Specifically, the lease does not include a provision which would afford the licensee an opportunity to purchase or lease the ITFS equipment in the event that the lease is terminated as a result of some action on the part of the excess capacity lessee. We believe that, as a matter of policy, such a provision should be added to insure that a licensee will not be forced to interrupt its ITFS programming as a result of any action on the part of its lessee. Further, the term of the lease is calculated to run ten years from the time the licensee notifies the FCC of the completion of program tests. This would run beyond the permitted term of an excess capacity lease, which is limited to ten years from the grant of license. *Instructional Television Fixed Service in Gen. Dockets 90-54 and 80-113*, 5 FCC Rcd 6410, 6416 (1990). Neither of these provisions, however, reflects adversely on the applicant's basic or comparative qualifications, nor does the presence of such provisions preclude grant of an authorization. Nevertheless, Turner's authorization will be conditioned upon conformity of the lease to Commission requirements. *Milwaukee Regional Medical Instructional Television Station, Inc.*, 2 FCC Rcd 142, 143 (1987). Additionally, there is no petition to deny Turner's application, and we find the applicant to be fully qualified.

8. Accordingly, IT IS ORDERED, That the above-captioned application of Gold-Burg Independent School District (BPLIF-911008EE) IS DENIED, the application of Slidell Independent School District (BPLIF-910603DH) IS DISMISSED, and the application of Turner Independent School District (BPLIF-911007DB) IS GRANTED, subject to the following condition:

> Turner Independent School District shall, within 30 days of the release of this Order, submit for approval by the Chief, Distribution Services Branch, information demonstrating compliance with the Commission's requirements, including, if appropriate, an amended excess capacity lease conforming with the requirements discussed herein.

9. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 90-315

In the Matter of

Amendment of Part 87 of the
Commission's Rules to
Establish Technical Standards
and Licensing Procedures for
Aircraft Earth Stations

MEMORANDUM OPINION AND ORDER

Adopted: May 3, 1993; Released: May 12, 1993

By the Commission:

I. INTRODUCTION

1. The Commission adopted a *Report and Order* (*R&O*) in PR Docket 90-315,[1] released September 9, 1992, establishing technical standards and licensing procedures for aircraft earth stations (AESs).[2] Aeronautical Radio, Inc. and the Air Transport Association of America (ARINC/ATA) filed a *Petition for Clarification or Partial Reconsideration* (*Petition*)[3] to clarify that the *R&O* had established technical standards and equipment authorization requirements for *all* mobile earth stations operating in the upper L-band (as opposed to only AESs)[4] or that the Commission reconsider its decision and adopt such standards.[5] This *Memorandum Opinion and Order* denies ARINC/ATA's petition.

II. PETITION

2. In their *Petition*, ARINC/ATA agree with the Commission's decision to establish technical standards for AESs without waiting for data on other mobile-satellite services.[6] Petitioners state, however, that they "continue to be concerned that the FCC has not committed to take steps sufficient to ensure that the aeronautical safety communication services are protected from harmful interference from other mobile-satellite users sharing the band."[7] ARINC/ATA contend that requiring equipment authorization procedures for all mobile earth stations under 47 C.F.R. Part 2 Subpart J of the Commission's Rules is the best method to prevent interference. They argue that the Commission should reconsider or clarify its *R&O* to make clear that appropriate technical standards will be adopted for all mobile earth stations operating in the upper L-band.[8]

3. AMSC Subsidiary Corporation (AMSC Subsidiary) filed an *Opposition to Petition for Clarification or Partial Reconsideration* (*Opposition*). AMSC Subsidiary argues that the *R&O* created no ambiguity over whether all mobile-satellite stations are subject to technical standards and equipment type acceptance and that the Commission had denied the petitioners' request to do so.[9] It contends that the established process for licensing mobile terminals affords interested parties ample opportunity to comment on the adequacy of the technical parameters that AMSC establishes.[10] ARINC filed reply comments (*Reply*).[11] ARINC states that "AMSC will not be the only licensee of mobile earth terminals" and that "as a carrier's carrier, [AMSC] can expect to have numerous licensees operating through its system."[12]

III. DISCUSSION

4. We have carefully reviewed the *Petition* and find that our *R&O* on this point was clear and that ARINC/ATA advance no new arguments or any compelling reasons to change the rules adopted in the *R&O*. In the *R&O*, we considered, among other things, establishing technical standards for maritime earth stations and land mobile earth stations in addition to aircraft earth stations.[13] We declined to do so. We stated in the *R&O* that these issues were fully addressed in the *Second Report and Order* (*Second Allocation R&O*) in Gen. Docket No. 84-1234, and in our *Memorandum Opinion, Order and Authorization* (*MOO&A*).[14] In the *MOO&A*, we made American Mobile Satellite Corporation (AMSC) and its service providers directly responsible for designing the satellite system to incorporate co-channel, adjacent channel, and adjacent beam interference protection.[15] AMSC or other service providers will be issued a blanket license for Land Mobile-Satellite Service (LMSS) and Maritime Mobile-Satellite Service (MMSS) terminals[16]

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[1] 7 FCC Rcd 5895 (1992).

[2] An AES is a mobile station in the Aeronautical Mobile-Satellite Service or the Aeronautical Mobile-Satellite (Route) Service located on board an aircraft.

[3] FCC Public Notice No. 1920 (November 24, 1992).

[4] *See Petition* at 2. ARINC/ATA use the term "upper L-band" to refer to the frequency bands 1545-1559 MHz and 1646.5-1660.5 MHz. The frequency band 1545-1559 MHz is the frequency allocation for space-to-Earth use, and the corresponding allocation for Earth (aircraft)-to-space use is 1646.5-1660.5 MHz. For the purposes of this proceeding, we will use the term "upper L-band" likewise.

[5] *See Petition* at 5.

[6] The Aeronautical Mobile-Satellite (Route) Service (AMS(R)S) shares the band with the Maritime Mobile Satellite Service (MMSS) and the Land Mobile Satellite Service (LMSS).

[7] *Petition* at 1.

[8] *See Petition* at 2.

[9] *See Opposition* at 3.

[10] *See Opposition* at 3.

[11] The *Reply* was received late; however it is being considered. ATA did not participate in the *Reply*.

[12] *Reply* at 3.

[13] *See R&O* at 5896.

[14] *See Second Report and Order* (*Second Allocation R&O*) in Gen. Docket No. 84-1234, 2 FCC Rcd 485 (1986), *recon. denied*, 4 FCC Rcd 6029 (1989); *Memorandum Opinion, Order and Authorization* (*MOO&A*) in Gen. Docket No. 84-1234, 4 FCC Rcd 6041 (1989), *remanded on other grounds, Aeronautical Radio, Inc. v. F.C.C.*, 928 F.2d 428 (D.C. Cir. 1991); *Tentative Decision*, 6 FCC Rcd 4900 (1991); *Final Decision on Remand*, 7 FCC Rcd 266 (1992); *Aeronautical Radio, Inc., et al v. F.C.C.*, 983 F. 2d 275 (D.C. Cir. 1993).

[15] *See MOO&A* at 6055.

[16] AMSC may provide service or other vendors may provide service via feeder links which operate through AMSC's gateway station or feeder links belonging to the vendor. *See Second Allocation R&O* at 489.

which will make them responsible for ensuring that all such terminals are capable of operating in accordance with the terms of their licenses.[17]

5. While we believe that the *R&O* is adequate to its purpose as it stands at this time, we take this opportunity to note the formation of the Mobile-Satellite Service Interagency Ad Hoc Working Group (MSS Interagency Group). This group is composed of members representing the Federal Aviation Administration (FAA), the National Telecommunications and Information Administration (NTIA), the United States Coast Guard, and the Commission. This group was formed to identify MSS service capabilities/functions necessary to ensure compliance with the Table of Frequency Allocations footnotes 726C,[18] 729A,[19] 730C,[20] and US308.[21] These footnotes generally concern the priority of distress and safety communications in the aeronautical or maritime services. The MSS Interagency Group is mandated to seek establishment of assurances of implementation of the service capabilities/functions which it identifies. We note here that the FAA and the NTIA have jointly sent a letter to the Commission "recommend[ing] that the Commission undertake a rulemaking proposing the incorporation of the enclosure, 'Mobile Satellite Service System and Service Capabilities/Functions,' into the Commission's service rules."[22] The enclosure to that letter is directly based upon the work of the MSS Interagency Group to date and is under consideration.

IV. ORDERING CLAUSES

6. Accordingly, IT IS ORDERED that the *Petition for Clarification or Partial Reconsideration* IS DENIED.

7. For further information, contact Marcus Wolf, RM 5114-A, Private Radio Bureau, Federal Communications Commission, 1919 M ST, NW, Washington, DC 20554; telephone 202-632-7197.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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17 *See Second Allocation R&O* at 489.

18 Final Acts of the World Administrative Radio Conference Dealing with Frequency Allocations in Certain Parts of the Spectrum (WARC-92), Malaga-Torremolinos, 1992.

19 47 C.F.R. § 2.106, n.729A.

20 *Supra*. n.18.

21 *Supra* n.19.

22 Letter from Richard D. Parlow, Associate Administrator, Office of Spectrum Management, NTIA; and Gerald Markey, Manager, Spectrum Engineering Division, FAA to Cheryl Tritt, Chief, Common Carrier Bureau, FCC (January 14, 1993).

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 93-133

Amendment of Part 80 of the
Commission's Rules Concerning
the General Exemption for Large
Oceangoing Cargo Vessels and
Small Passenger Vessels

NOTICE OF PROPOSED RULE MAKING

Adopted: May 3, 1993; **Released: May 12, 1993**

Comments Due: July 6, 1993
Reply Comments Due: July 21, 1993

By the Commission:

I. INTRODUCTION

1. This Notice of Proposed Rule Making (Notice) proposes to revise and update the requirements of the two general exemptions from the radiotelegraph equipment requirements of the Communications Act of 1934 (Communications Act),[1] described in Part 80 of the Commission's Rules, 47 C.F.R. Part 80, for large oceangoing cargo vessels[2] and small passenger vessels.[3]

II. BACKGROUND

2. The Communications Act specifies that all passenger vessels and large oceangoing cargo vessels must carry a radiotelegraph (manual Morse code) station.[4] Section 352(b) of the Communications Act, 47 U.S.C. § 352(b), however, provides the Commission with the authority to, among other things, exempt a ship or class of ships from the requirement to carry manual Morse code radiotelegraph equipment under certain conditions.[5] To reduce the regulatory burden, the Commission adopted rules specifying certain conditions for cargo vessels[6] and passenger ships[7] which, if complied with, would not require filing a specific vessel-by-vessel exemption request. The Commission's Rules currently contain "general exemptions" that cover, among other things, large oceangoing cargo vessels operating on domestic voyages along the coasts of the 48 contiguous states, not more than 150 nautical miles from the nearest land[8] as well as small passenger vessels operating on certain domestic voyages.[9]

III. DISCUSSION

3. Since the general exemption Rules were adopted, several of their substantive provisions have become outdated or unnecessary because of advancements in technology[10] or expanded routes of service.[11] In addition, the Commission has received several inquiries[12] seeking clarification of the terms of the large cargo vessel general exemption.[13] As a result, we believe it is appropriate to propose changes to the existing general exemption for large cargo vessels and the general exemption for certain small passenger vessels.

A. General Exemption for Large Cargo Vessels

4. First, we believe that the current geographical limitation on the applicability of the present general exemption to voyages along the coasts of the 48 contiguous states is unnecessarily restrictive. Section 352(b) of the Communications Act permits the Commission to exempt vessels from the radiotelegraph requirements based on, among other things, the route of the voyage. The majority of individual exemption requests we receive concern operations between California and Alaska or between California and the Gulf of Mexico by way of the Panama Canal. Because such vessels are operated on voyages that are extensions of routes along the 48 contiguous states, are equipped with radio systems that provide multiple pathways for distress and safety communications, and do not

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[1] 47 U.S.C. §§ 351-364.

[2] Cargo vessels 1,600 gross tons and over. *See* 47 U.S.C. § 351(a)(1)(B).

[3] Passenger vessels less than 100 gross tons. *See* 47 U.S.C. § 352(b)(3).

[4] 47 U.S.C. § 351(a)(1).

[5] *See* 47 U.S.C. §§ 352(b)(1)-(3).

[6] For example, large cargo vessels must be equipped with satellite equipment and a radiotelephone capable of sending and receiving both data and voice. *See* 47 C.F.R. § 80.836(c).

[7] Small passenger vessels must be equipped with two independent means of communication for voyages beyond 100 nautical miles from land. *See Report and Order* PR Docket No. 90-134, 6 FCC Rcd 1969 (1991); *Memorandum Opinion and Order,* PR Docket No. 90-134, 7 FCC Rcd 4582 (1992).

[8] *See Report & Order,* PR Docket No. 79-336, 47 Fed. Reg. 10220 (1982).

[9] Small passenger vessels generally do not have room to carry a manual Morse code radiotelegraph installation. The Commission recognized this in an *Order* dated May 8, 1957 (F.C.C. 54-477), which first adopted a general exemption for small passenger vessels. *See* 47 C.F.R. §§ 80.836(a) and 80.933(b).

[10] For example, the Commission adopted rules to implement the Global Maritime Distress and Safety System (GMDSS). *See Report and Order,* PR Docket No. 90-480, 7 FCC Rcd 951 (1992). The GMDSS, the result of over a decade of work by the world's maritime nations, is an automated ship-to-shore distress alerting system that relies on satellite and advanced terrestrial systems. The GMDSS will be phased in during the 1992-1999 time period.

[11] Frequently, exemption requests concern voyages between the Gulf of Mexico and California via the Panama Canal as well as between California and Alaska.

[12] *See, e.g.,* letters from Mr. David Shoemaker, Del Mar Electronics, to Mr. Marc S. Martin, Aviation and Marine Branch, Special Services Division, Private Radio Bureau, Federal Communications Commission, Washington, D.C. (August 21, 1992), from Mr. Richard H. Garrett, Mackay Communications, to Mr. George R. Dillon, Enforcement Division, Field Operations Bureau, Federal Communications Commission, Washington, D.C. (January 22, 1988).

[13] *See* 47 C.F.R. § 80.836(c).

operate more than 150 nautical miles from land[14] the Commission generally grants such individual exemption requests provided the cargo vessels conform to the conditions specified in the general exemption contained in Section 80.836(c). In this context, the exemption application requirement is an unnecessary burden on both the public and the Commission. Therefore, we propose amending the large cargo vessel general exemption by broadening its applicability to domestic voyages through the Panama Canal Zone, to Alaska, to Puerto Rico, and along the coasts of the 48 contiguous states, not more than 150 nautical miles from the nearest land.[15] Additionally, to reflect recent technological advances in emergency position-indicating radio beacons (EPIRBs), we are proposing to add a condition to the general exemption that vessels carry a satellite EPIRB.[16]

5. Second, there have been numerous improvements in technology since the general exemption rules were adopted. Specifically, the Commission recently adopted rules implementing GMDSS.[17] The Commission determined that GMDSS offered significant advantages over the current marine manual Morse code radiotelegraph capabilities. Therefore, we propose to add GMDSS equipment to the list of acceptable communications alternatives specified under the general exemption.[18] This will update the exemption rules and allow GMDSS equipped vessels to qualify for the general exemption without having to purchase unnecessary equipment.

6. Further, we propose to make several editorial changes to this general exemption in the interest of greater clarity and simplicity. We seek comment on the proposed changes to the large cargo vessel exemption provisions.

B. General Exemption for Small Passenger Vessels

7. Each year, we receive a large number of requests for exemption from the manual Morse code radiotelegraph equipment requirements of the Communications Act to permit the operation of small passenger vessels on short international voyages.[19] In the vast majority of such cases, these vessels are equipped with marine radio equipment capable of sending and receiving voice communications which complies with Subpart S of Part 80 of the Commission's Rules, 47 C.F.R. Part 80, Subpart S, and operate within VHF range of Coast Guard or public coast stations, not more than 20 nautical miles from the nearest land or, alternatively, on voyages not more than 200 nautical miles between two consecutive ports. Therefore, the voyages of such vessels would be in compliance with the conditions set forth in the general exemption from the radiotelegraph equipment requirement of the Commission's Rules,[20] but for the fact that the vessels make port at nearby foreign destinations.[21]

8. Vessel operators not complying with the domestic route requirement of the general exemption must request an individual exemption from both the International Convention for the Safety of Life at Sea, 1974, as amended (Safety Convention)[22] and the Communications Act. The specific exemption process requires a vessel operator to submit to the Commission an exemption application as well as two separate fees in order to obtain a one year exemption from the Commission.[23] These vessel operators are typically small family businesses which transport tourists on short voyages. Under such circumstances, the individual exemption application process and its concomitant fees constitute an unnecessary burden on this sector of the maritime community.[24] In addition, the Commission incurs the administrative burden of processing fees, evaluating applications and issuing exemption letters and Safety Convention Exemption Certificates to the applicants in a timely manner.[25]

9. Because such short international voyages involve virtually identical routes and conditions as those authorized by the general exemption, they do not present safety concerns greater than the domestic voyages authorized by the current general exemption. Therefore, the Commission normally grants such exemption requests. Under these circumstances, we propose broadening the current general exemption for small passenger vessels contained in Section 80.933(b) to include certain short international voyages in the regions from which we most frequently receive such individual exemption requests (the waters contiguous to the coasts of Southern California and Baja California, Mexico, the Pacific Northwest and the Caribbean Sea) subject to the same conditions contained in the current general exemption. We request specific comment on whether other areas should be added or whether greater distances from land should be included for vessels equipped with a medium frequency radiotelephone equipment. In addition to this substantive change, we also propose a minor editorial clarification of the current general exemption for small pas-

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[14] Section 352(b)(2) of the Communications Act limits the Commission's authority to exempt U.S. cargo vessels from the radio station requirements to voyages within 150 nautical miles from the nearest land, irrespective of whether such vessels operate on international or domestic voyages. It is generally recognized in the maritime community that 150 nautical miles is the average distance that medium frequency radio can cover (high frequency radio and satellite communications are worldwide).

[15] It is the view of the U.S. Coast Guard that these voyages are domestic voyages.

[16] *See* 47 C.F.R. § 80.1061.

[17] *See* note 10, *supra*.

[18] *See* 47 C.F.R. § 80.836(c).

[19] The general exemption from the radiotelegraph requirements of the Communications Act contained in Section 80.836(a) of the Commission's Rules, 47 C.F.R. § 80.836(a) for small passenger vessels only applies to such vessels operated on domestic voyages.

[20] *See* 47 C.F.R. §§ 80.905 and 80.933(b).

[21] For example, a vessel operating in the Caribbean Sea may make international voyages that are less than a mile when traveling between the U.S. Virgin Islands and the British Virgin Islands.

[22] 32 U.S.T. 47, T.I.A.S. 9700. The Safety Convention specifies, among other things, the radio communications carriage requirements for vessels carrying more than 12 passengers on international voyages.

[23] Because exemption applications currently have a fee of $105, an applicant for an exemption from the radio communications requirements of both the Communications Act and the Safety Convention must pay a total fee of $210.

[24] *See* letter from Ronald A. Hale, President, Heritage Boats, Inc., St. Thomas, U.S.V.I. to Acting Chief, Aviation and Marine Branch, Special Services Division, Private Radio Bureau, Federal Communications Commission, Washington, D.C. (July 11, 1991).

[25] Applicants frequently submit their exemption applications to the Commission only one to three weeks prior to the time they plan to commence their marine operations.

senger vessels operated on domestic voyages to specify the applicable Sections of the Commission's Rules and to group it with similar exemptions.[26]

IV. CONCLUSION

10. By this action, we propose to amend the Commission's Rules to broaden, update and clarify general exemptions from the radiotelegraph equipment requirements of the Communications Act for large cargo and small passenger vessels. By updating the general exemptions, the proposed changes would eliminate unnecessary regulatory burdens on several sectors of the maritime community.

INITIAL REGULATORY FLEXIBILITY ANALYSIS

11. An Initial Regulatory Flexibility Analysis is contained in Appendix A.

V. PROCEDURAL MATTERS

12. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, and 1.206(a).

13. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before **July 6, 1993,** and reply comments on or before **July 21, 1993**. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Room of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

14. Authority for issuance of this *Notice* is contained in Sections 4(i), 303(r), 352(b)(2), and 352(b)(3) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 4(i), 303(r), 352(b)(2) and 352(b)(3).

15. For further information regarding this *Notice*, contact Marc S. Martin, Private Radio Bureau, Aviation and Marine Branch, (202) 632-7175.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[26] *See* proposed changes to 47 C.F.R. § 80.933(c) in Appendix B.

APPENDIX A

INITIAL REGULATORY FLEXIBILITY ANALYSIS

1. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IFRA) of the expected impact on small entities of the proposals contained in this *Notice*. We request written public comment on the IRFA, which follows. Comments must have a separate and distinct heading designating them as responses to the IFRA and must be filed by the deadlines provided in paragraph 13, *supra*. The Secretary shall send a copy of this *Notice*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §§ 601-612 (1981).

A. Reason for Action

2. The Commission proposes to broaden, revise and update the current general exemptions for certain vessels operating on specific voyages in order to eliminate a substantial burden on the public, reduce administrative costs and to improve government efficiency.

B. Objectives

3. We seek to reexamine the requirements of the general exemptions for certain vessels in order to reduce unnecessary burdens on the industry and administrative costs to the Commission and thereby increase efficiency in the marine radio service and within the Commission.

C. Legal Basis

4. The proposed action is authorized under Sections 4(i), 303(r), 352(b)(2) and (3) of the Communications Act, 47 U.S.C. §§ 154(i), 303(r), 352(b)(2) and (3).

D. Reporting, Recordkeeping and Other Compliance Requirements

5. Ship owners and operators of several classes of vessels operating on certain voyages, subject to certain conditions, will no longer be required to apply for a specific exemption from the Commission.

E. Federal Rules Which Overlap, Duplicate or Conflict with These Rules

6. None.

F. Description, Potential Impact, and Small Entities Involved

7. The proposals would broaden, revise and update the general exemptions for several classes of vessels, which would eliminate unnecessary regulatory burdens such as the requirement to apply for specific exemptions. Further, these proposals would significantly reduce the time and expense required by the Commission to process and evaluate applications of the various classes of vessels involved. Specifically, adopting the proposed changes to the small passenger general exemption should return approximately

$40,000 to the economy and reduce approximately 1,300 burden hours on the Commission by eliminating the need for exemptions in certain circumstances.[27] Because cargo vessels 1,600 gross tons and over are not typically owned by small businesses, only the changes to the general exemption for small passenger vessels are likely to concern small businesses.

G. Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives

8. None.

APPENDIX B

Proposed Rules

Title 47 of the Code of Federal Regulations, Part 80, is proposed to be amended as follows:

Part 80 - Stations in the maritime services

1. The authority citation for Part 80 continues to read as follows:

Authority: Sections 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1968, 1081-1105, as amended; 47 U.S.C. 151-155, 301-609; 3 UST 3450, 3 UST 4726, 12 UST 2377.

2. In Section 80.836, the section heading is revised, paragraph (a) is removed, paragraphs (b), (c) and (d) are redesignated as (a), (b) and (c), respectively, and newly designated paragraph (b) is revised to read as follows:

§ 80.836 General cargo vessel exemptions.

* * * * *

(b) Cargo ships of 1600 gross tons and upward are exempt from the radiotelegraph requirements of Part II of Title III of the Communications Act, if the following criteria are met:

(1) The ship operates on domestic voyages only. For purposes of this paragraph, the term domestic voyages includes ports in Alaska, Puerto Rico, along the coasts of the 48 contiguous states and routes through the Panama Canal Zone, so long as the vessel does not make port at a foreign destination;

(2) The routes of the voyage are never more than 150 nautical miles from the nearest land;

(3) The ship complies fully with the requirements for the Global Maritime Distress & Safety System (GMDSS) contained in Subpart W of this part; or

(4) The ship complies fully with all of the following conditions. The ship must:

(i) Be equipped with a satellite ship earth station providing both voice and telex;

(ii) Be equipped with a VHF and MF radiotelephone installation which complies fully with Subpart R of this part and have the capability of operating on the HF frequencies listed in Section 80.369(b) for distress and safety communications (this capability may be added to the MF radiotelephone installation);

(iii) Be equipped with a narrow-band direct-printing radiotelegraph system with SITOR meeting the requirements of Section 80.219;

(iv) Be equipped with at least two VHF transceivers capable of being powered by the reserve power supply (one of the VHF transceivers may be the VHF required by paragraph (b)(4)(ii) of this paragraph);

(v) Be equipped with a Category 1, 406.025 MHz EPIRB meeting the requirements of Section 80.1061;

(vi) In addition to the main power source, be equipped with an emergency power source which complies with all applicable rules and regulations of the U.S. Coast Guard (the satellite earth station, the narrow-band direct-printing equipment and the 500 kHz autoalarm receiver must be capable of being powered by the main and emergency power sources);

(vii) Be equipped with a 500 kHz autoalarm receiver and a means of recording or decoding any distress signal received for relay to the Coast Guard or a public coast station;

(viii) Participate in the AMVER system when on voyages of more than twenty-four hours and have the capability of operating on at least four of the AMVER HF duplex channels;

(ix) Carry at least one licensed operator to operate and maintain all of the ships's distress and safety radio communications equipment in accordance with Sections 80.159(c) and 80.169; and

(x) Maintain a continuous watch on 2182 kHz and 156.8 MHz when navigated.

* * * * *

3. In Section 80.933, the section heading is revised, paragraphs (a), (b) and (c) are redesignated as (b), (c) and (d), a new paragraph (a) is added and newly designated paragraph (c) is revised to read as follows:

§ 80.933 General small passenger vessel exemptions.

(a) All U.S. passenger vessels of less than 100 gross tons, not subject to the radio provisions of the Safety Convention, are exempt from the radiotelegraph provisions of Part II of Title III of the Communications Act, provided that the vessels are equipped with a radiotelephone installation fully complying with Subpart S of this part.

* * * * *

(c) Subject U.S. vessels less than 100 gross tons which are equipped with VHF installations meeting the requirements of this subpart are exempt from the radiotelegraph requirements of Part II of Title III of the Communications Act

[27] *See* discussion of the burden and fees associated with exemption applications in paragraph 8 of the Notice. We estimate that each exemption application requires eight staff hours to process and evaluate. Further, we estimate receipt of approximately 160 exemption applications each year for small passenger vessels operated on the voyages that the proposed general exemption would cover.

and the medium frequency radiotelephone requirements of this subpart as well as Regulations 7 to 11 of Chapter IV of the Safety Convention on the condition that the vessels remain within the effective coverage area of U.S. Coast Guard or public coast stations operating in the band 156-162 MHz, not more than 20 nautical miles from the nearest land or, alternatively, not more than 200 nautical miles between two consecutive ports, when the vessels are navigated on the following domestic and international voyages:

(1) In waters contiguous to Hawaii and the islands in the Caribbean Sea;

(2) In waters contiguous to the coast of Southern California from Point Conception south to Cape San Lucas, Mexico; the Islands of San Miguel, Santa Rosa, Santa Cruz, Anacopa, San Nicolas, Santa Barbara, Santa Catalina, and San Clemente are considered to be within these waters; or

(3) In waters contiguous to the coast of the Pacific Northwest from Seattle, Washington north to Vancouver Island, Canada.

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

Brazosport Junior College Brazoria, Texas	File No. BPLIF-911008EW
El Campo Independent School District Chalmers, Texas	File No. BPLIF-910613DD
Wharton County Junior College Wharton, Texas	File No. BPLIF-911009DD

For Construction Permit and
License in the Instructional
Television Fixed Service on
Channels B1, B2, B3, and B4

MEMORANDUM OPINION AND ORDER

Adopted: May 3, 1993; Released: May 12, 1993

By the Commission:

1. The Commission has before it for consideration the mutually exclusive applications of Brazosport Junior College (Brazosport), El Campo Independent School District (El Campo), and Wharton County Junior College (Wharton), for facilities in the Instructional Television Fixed Service (ITFS) on channels B1-B4 in the Wharton, Texas area.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first determine their basic eligibility. Brazosport is qualified to be an ITFS licensee. It is an educational institution engaged in the formal education of enrolled students and accredited by the Southern Association of Colleges and Universities. Although Brazosport proposes to serve students outside its campus, it also proposes to serve its own students. El Campo is also qualified to be an ITFS licensee. It is a governmental organization engaged in the formal education of enrolled students and is accredited by the Texas Education Agency. El Campo proposes to serve students within its own jurisdiction and also students of schools in neighboring school districts. Wharton is also qualified to be an ITFS licensee. It is an educational institution engaged in the formal education of enrolled students and is accredited by the Southern Association of Colleges and Universities. Wharton proposes to serve students on its campus and in neighboring jurisdictions.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of twelve merit points based on five criteria deemed to be most relevant to determine the applicant best qualified to provide the service for which the ITFS spectrum has been established. *Instructional Television Fixed Service - Second Report and Order in MM Docket No. 83-523 ("ITFS Second Report and Order")*, 101 F.C.C. 2d 49, 65-72 (1985); 47 C.F.R. §74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose request would result in the acquisition by that applicant of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[2] Fifth, one point is awarded to applicants which are existing E or F channel licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, Brazosport, El Campo, and Wharton are awarded points based on the following criteria:

Localism. Each applicant is entitled to four points for being a governmental entity and/or educational institution serving the formal educational needs of schools within its respective jurisdiction.

Accreditation. Brazosport and Wharton, both accredited by the Southern Association of Colleges and Universities, are entitled to three points for accreditation. El Campo is accredited by the Texas Education Agency, and is also entitled to three points for accreditation.

Four-Channel Limitation. None of the applicants is the licensee of, or has filed applications for, additional ITFS facilities in their respective areas. Thus, Brazosport, El Campo, and Wharton are entitled to the two points for remaining within the four-channel limitation.

Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a program "grid". Brazosport's illustrative schedule and programming grid proposes an average of 22.50 hours of formal educational

[1] A "local" applicant is an institution or organization that is physically located in the community or metropolitan area where service is proposed. *ITFS Second Report and Order*, 101 F.C.C. 2d at 59; 47 C.F.R. §74.932, Note 1.

[2] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of other ITFS programming. Two points awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. §74.913(b)(4)

programming per channel per week. Thus, Brazosport is entitled to one programming merit point. El Campo's illustrative schedule and programming grid propose an average of 20 hours of formal educational programming per channel per week. Because this amount does not reach the threshold at which merit points are awarded, El Campo is entitled to no programming merit points. The amended illustrative schedule and amended programming grid for Wharton, submitted on the "B" cut-off date, each propose an average of 41 hours of formal educational programming per channel per week. Thus, Wharton is entitled to two programming merit points.

E- and F- Channel Group Relocations. None of the applicants is the current licensee of E or F channels seeking to relocate to ITFS channel groups. Consequently, Brazosport, El Campo, and Wharton are not entitled to the one point for relocation from these channel groups.

Total. Brazosport is entitled to four points for being local, three points for being accredited, two points for remaining within the four-channel limitation, and one point for proposing at least 21 hours of formal educational programming, for a total of ten points. El Campo is entitled to four points for being local, three points for being accredited, and two points for remaining within the four-channel limitation, for a total of nine points. Wharton is entitled to four points for being local, three points for being accredited, two points for remaining within the four-channel limitation, and two points for proposing at least 41 hours of formal educational programming, for a total of eleven points. Thus, the tentative selectee is Wharton.

OTHER MATTERS

5. Wharton proposes to lease its excess capacity for non-ITFS use, as permitted by Section 74.931, and has submitted a copy of its lease with United States Wireless Cable, Inc. (U.S. Wireless). Several of that lease's provisions do not comply with the Commission's requirements for excess capacity leases. First, the lease provides for an initial term of five years or less depending on the expiration date of Wharton's license. Thereafter, the lessee (not the ITFS licensee) is entitled to extend the agreement for up to five successive terms of five years, constituting, in effect, a term of 30 years. In addition, in the event Wharton and U.S. Wireless are unable to reach agreement on additional renewals, the lease provides for a six-month continued operation of U.S. Wireless on the licensed channels. These provisions are inconsistent with the Commission's 10-year maximum for excess capacity leases. *Instructional Television Fixed Service in Gen. Dockets 90-54, 80-113 - Report and Order,* 5 F.C.C. Rcd 6410, 6416 (1990). Second, although the lease provides for consultation with Wharton regarding location of the transmission point, another provision gives U.S. Wireless authority to change this site. We view this as inconsistent with the ITFS licensee's responsibility to ensure the adequacy of its service. *Second Report and Order,* 101 F.C.C. 2d at 90. Although inconsistent with our requirements for excess capacity leases, these provisions neither reflect on the applicant's basic or comparative qualifications nor preclude grant of an authorization. *Milwaukee Regional Medical Instructional Television Station, Inc.,* 2 F.C.C. Rcd 1472, 1473 (1987). Accordingly, Wharton's authorization will be conditioned upon conformity of the lease to Commission requirements. Additionally, there are no petitions to deny Wharton's application, and we find Wharton to be fully qualified.

6. Accordingly, IT IS ORDERED, That the application of Wharton County Junior College (BPLIF-911009DD) IS GRANTED subject to the condition that within 30 days from the date of this Order, Wharton County Junior College submits to the Chief, Distribution Services Branch for approval information demonstrating compliance with Commission requirements, including, if appropriate, an amended excess capacity lease conforming to the requirements discussed herein. The applications of Brazosport Junior College (BPLIF-911008EW) and El Campo Independent School District (BPLIF-910613DD) ARE DENIED.

7. The staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

WASHINGTON PUBLIC SCHOOL
Lindsay, OK — File No. BPLIF-911011DI

ALEX PUBLIC SCHOOL
Lindsay, OK — File No. BPLIF-920110DM

For Construction Permit and License
in the Instructional
Television Fixed Service on
Channels G1, G2, G3, and G4

MEMORANDUM OPINION AND ORDER

Adopted: May 3, 1993; Released: May 12, 1993

By the Commission:

1. The Commission has before it for consideration the above-captioned mutually exclusive applications of Washington Public School (Washington) and Alex Public School (Alex), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on Channels G1-G4 in the Lindsay, Oklahoma area.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of Washington and Alex. Both applicants are qualified to be ITFS licensees. Both are schools engaged in the formal education of enrolled students, and accredited by the Oklahoma State Department of Education. Although each applicant proposes to serve students outside its jurisdiction, each proposes to serve its own students and is, therefore, a local applicant.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive ITFS applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of twelve merit points based on five criteria deemed to be most relevant to predicting the applicant best qualified to provide the service for which the ITFS spectrum has been established. *Instructional Television Fixed Service - Second Report and Order in MM Docket 83-523 (Second Report and Order)*, 101 F.C.C. 2d 49, 65-72 (1985); 47 C.F.R. §74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[2] Fifth, one point is awarded to applicants which are existing E or F channel licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, Washington and Alex are awarded points based on the following criteria:

Localism. Each applicant is entitled to four points for being a governmental entity serving the formal educational needs of schools within its respective jurisdiction.

Accreditation. Each applicant, accredited by the Oklahoma State Department of Education, is entitled to three points for accreditation.

Four-Channel Limitation. Neither Washington nor Alex is the licensee of, or has filed applications for, additional ITFS channels in the Lindsay, Oklahoma area. Consequently, each is entitled to two points for remaining within the four-channel limitation.

Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a program "grid." Where the amounts and types of programming proposed in the schedule and in the grid are inconsistent, we shall consider as correct, for comparative purposes, the amount and type which result in the least number of points to the applicant, so long as the excess capacity lease permits that level of programming to be transmitted. *Hispanic Information and Telecommunications Network, Inc.*, 7 FCC Rcd 5924 (1992). Washington's illustrative schedule proposes an average of 24.375 hours of ITFS programming per channel per week. However, the schedule does not indicate which programs are formal educational, as required by Section IV, Question 5 of the application. Accordingly, we will consider this programming as nonformal for the purpose of determining merit points. *Valley View Independent School District*, 7 FCC Rcd 7228 (1992). In contrast, its programming grid proposes an average of 4 hours of formal educational programming per channel per week. Because neither the schedule nor the grid establishes the threshold amount at which merit points are awarded, Washington is entitled to no programming merit points.

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[1] A "local" applicant is an institution or organization that is physically located in the community, or metropolitan area, where service is proposed. *Second Report and Order*, 101 F.C.C. 2d at 59; 47 C.F.R. §74.932, Note 1.

[2] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of total ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. §74.913(b)(4).

Alex's illustrative schedule indicates an average of 25 hours of formal educational programming per channel per week, and its programming grid indicates the same. Thus, Alex is deemed to have proposed an average of 25 hours of formal educational programming per channel per week, and is entitled to one programming merit point.

E- and F- Channel Group Relocation. Neither Washington nor Alex is the current licensee of an E or F channel seeking to relocate to other channels. Consequently, neither is entitled to the one point for such applicants.

Total. Washington is entitled to points for being local, for being accredited, and for observing the four-channel limitation, for a total of nine points. Alex is entitled to points for being local, for being accredited, for proposing at least 21 hours of formal educational programming and for observing the four-channel limitation, for a total of 10 points. Thus, the selectee is Alex.

OTHER MATTERS

5. Alex proposes to lease its excess capacity for non-ITFS use as permitted by Section 74.931, and will submit a copy of its lease with Rural Electric Cooperative upon completion of negotiations. Accordingly, the authorization of Alex will be conditioned upon submission of a lease agreement which complies with the Commission's Rules. *Rush Springs Public Schools*, FCC 92-580, released January 15, 1993. Additionally, there are no petitions to deny Alex's application, and we find Alex to be fully qualified and that a grant of Alex's application will serve the public interest, convenience, and necessity.

6. Accordingly, IT IS ORDERED, That the application of Washington Public School (BPLIF-911011DI) IS DENIED, and the application of Alex Public School (BPLIF-920110DM) IS GRANTED, subject to the condition that within 30 days of the release of this Order Alex submits to the Chief, Distribution Services Branch for approval information demonstrating compliance with Commission requirement, including, if appropriate, a copy of the lease agreement.

7. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: May 3, 1993

DEADLINE TO FILE PIONEER'S PREFERENCE REQUESTS FOR SATELLITE DIGITAL AUDIO RADIO SERVICE
GEN DOCKET NO. 90-357 (REF: RM-7400)

The Chief Engineer announced that June 2, 1993 will be the final day for filing pioneer's preference requests with regard to a petition to allocate the 2310-2360 MHz band for delivery of digital audio radio by means of satellites. Any party filing a pioneer's preference request must reference GEN Docket No. 90-357 and RM-7400 on the cover page of its request. Parties should note that this *Public Notice* does not apply to delivery of digital audio radio by terrestrial means.

This action is taken pursuant to the Commission's rules, which state that by public notice a date will be announced after which pioneer's preference requests relating to a specific new spectrum-based service or technology will not be accepted. 47 C.F.R. Section 1.402(c)(1992). The rules also state that a tentative preference will not be awarded an applicant that has not submitted a demonstration of technical feasibility or commenced an experiment and reported at least preliminary results. 47 C.F.R. Section 5.207 (1992). Therefore, June 2, 1993 also will be the final day for a pioneer's preference applicant to submit the demonstration of technical feasibility or experimental results required to be filed.

For further information, contact Damon C. Ladson, Office of Engineering and Technology, (202) 653-8106.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-68

In re Applications of

HARRY S. McMURRAY	File No. BPH-880301MP
MODESTO COMMUNICATIONS CORPORATION	File No. BPH-880301NC
BCD LIMITED PARTNERSHIP	File No. BPH-880301OS
THOM REINSTEIN COMMUNICATIONS, A California Limited Partnership	File No. BPH-880301OU

For Construction Permit for
New FM Station on Channel 230A,
Modesto, California

Appearances

B. Jay Baraff, Aaron P. Shainis, and *Lee J. Peltzman* on behalf of Harry S. McMurray; *John Griffith Johnson, Jr.* on behalf of Modesto Communications Corporation; *Richard R. Zaragoza, Kathryn R. Schmeltzer,* and *John K. Hane* on behalf of BCD Limited Partnership; and *J. Richard Carr* on behalf of Thom Reinstein Communications.

DECISION

Adopted: April 29, 1993; Released: May 14, 1993

By the Review Board: MARINO (Chairman) and GREENE. Board Member BLUMENTHAL issuing a separate statement.

Board Member GREENE:

1. The Review Board has before it the *Initial Decision* of Chief Administrative Law Judge Joseph Stirmer, *Modesto Broadcast Group,* 7 FCC Rcd 3404 (1992), which found Thom Reinstein Communications, A California Limited Partnership, to be the comparatively superior applicant for a new FM broadcast station in Modesto, California. The ALJ granted the Reinstein application and denied the applications of the other parties to this proceeding. Harry S. McMurray, Modesto Communications Corporation (MCC), and BCD Limited Partnership have excepted to this *Initial Decision,* each arguing it should receive the grant, and MCC and BCD have replied.[1] Reinstein has replied in defense of the *Initial Decision* and his application. The Board agrees with the ALJ that MCC and Reinstein are entitled to full quantitative integration credit and that McMurray receives none. The Board also finds that BCD is entitled to full quantitative credit. In comparing the applicants under the applicable comparative criteria, the Board concludes that BCD should be awarded the permit.[2]

BACKGROUND

2. When more than one qualified applicant seeks a construction permit for a new broadcast station, the Commission chooses among them on the basis of the well established goals set forth in its *Policy Statement on Comparative Broadcast Hearings,* 1 FCC 2d 393 (1965) (*Policy Statement),* and subsequent modifications.[3] *See Waters Broadcasting Corp.,* 91 FCC 2d 1260 (1982), *aff'd sub nom. West Michigan Broadcasting Co. v. FCC,* 735 F.2d 601 (D.C. Cir. 1984), *cert. denied,* 470 U.S. 1027 (1985). These goals are maximizing diversification of control of mass media, which is not at issue here, and providing the "best practicable service to the public." *Policy Statement* at 394. A factor of substantial importance in assessing the best practicable service--and the factor controlling the evaluation here--is the degree to which potential owners of the proposed station are integrated into its day-to-day management. The Commission awards quantitative credit to each applicant proportional to the amount of ownership possessed by the integrated managers. This quantitative credit can be qualitatively enhanced if the integrated owners possess certain characteristics, such as local residence or civic participation, minority status, and broadcast experience. *Id.* at 395-96; *West Michigan,* 735 F.2d at 604-05. However, qualitative enhancements "cannot overcome clear quantitative differences." *Absolutely Great Radio, Inc.,* 95 FCC 2d 1023, 1029 (1983), *remanded on other grounds sub nom. Ventura Broadcasting Co. v. FCC,* 765 F.2d 184 (D.C. Cir. 1985); *accord, Miracle Strip Communications, Inc.,* 4 FCC Rcd 5064, 5065-66 ¶ ¶ 17-18 (1989) (subsequent history omitted).

3. In computing the percentage of quantitatively integrated ownership, the Commission generally considers all of an applicant's ownership. However, where an applicant's general partners or voting stockholders control the applicant and the limited partners or non-voting stockholders are in fact nothing more than passive investors, their ownership interest will be disregarded. *Anax Broadcasting Inc.,* 87 FCC 2d 483, 488 (1981). The Commission is sensitive to abuses possible from such arrangements, so it scrutinizes

[1] The applications of Modesto Broadcast Group (File No. BPH-880301MB) and Pamela R. Jones (File No. BPH-880301OY) were dismissed with prejudice for failure of the applicants to file exceptions. *Order,* FCC 92R-85, released Nov. 9, 1992.

[2] Oral argument was held October 30, 1992.

[3] In light of the remand in *Bechtel v. FCC,* 957 F.2d 873 (D.C. Cir. 1992), the Commission has begun a rulemaking proceeding to reexamine its comparative criteria. *Reexamination of the Policy Statement on Comparative Broadcast Hearings,* 7 FCC Rcd 2664 (1992). Any revised criteria that may be adopted will likely be applied prospectively. *Anchor Broadcasting Limited Partnership,* 7 FCC Rcd 4566 (1992) (subsequent history omitted). *See Gloria Bell Byrd,* 7 FCC Rcd 7976, 7976 n.2 (Rev. Bd. 1992). *But see Flagstaff Broadcasting Foundation v. FCC,* 979 F.2d 1566 (D.C. Cir. 1992).

these applications to determine whether nominally passive owners are in fact in a position to influence or control the applicant's business. *See KIST Corp.*, 102 FCC 2d 288, 290 n.5 (1985), *aff'd sub nom. United American Telecasters, Inc. v. FCC*, 801 F.2d 1436 (D.C. Cir. 1986 (table), *cert. denied*, 481 U.S. 1050 (1987). Where an "applicant's described ownership structure accurately reflects the manner in which control will be exercised," credit will be given. *Royce International Broadcasting*, 5 FCC Rcd 7063, 7064 (1990), *recon. denied*, 6 FCC Rcd 2601 (1991). But, "where a 'passive' owner is shown to be materially involved in the applicant's activities after that owner has been held out as a passive investor," that owner's interest and the interests of all other passive owners will be attributed in calculating integration credit. *Coast TV*, 5 FCC Rcd 2751, 2752 ¶ ¶ 10, 15 (1990); *Royce* at 7064 ¶ 9.

QUANTITATIVE EVALUATION

4. *Harry S. McMurray.* McMurray, a sole proprietor, who proposes to work as the station's full-time general manager, excepts to the *Initial Decision's* failure to award him any quantitative integration credit. The ALJ denied credit after finding that McMurray was contractually barred from building and operating a station in Modesto by an eight-year non-compete agreement, dated July 31, 1985. *Initial Decision*, 7 FCC Rcd at 3424 ¶ ¶ 164-165. In 1985, McMurray, then a fifty percent owner of FMW Broadcasting, Inc., licensee of Stations KCEY (AM) and KMIX (FM), Turlock, California, entered into the covenant not to compete as part of a sales agreement following the sale of the Turlock stations to Radio Associates, Inc. *Id.* at 3413 ¶ 69. Under the terms of the covenant, the sellers are precluded from engaging in the radio business within certain counties, including the county in which Modesto is located. *Id.* at 3413, 3424 ¶ ¶ 69, 164. As consideration for that forbearance, Radio Associates agreed to pay the sellers the sum of $250,000, plus interest, on an installment basis over the eight-year period. *Id.* at 3413 ¶ 69.

5. In arriving at his conclusion, the ALJ rejected an argument by McMurray that the latter had reached an agreement in 1987 with Radio Associate's President, Kenneth Miller, to modify the agreement after McMurray applied for a station north of Modesto. *Id.* at 3424 ¶ 165. The ALJ noted that while it appears Radio Associates was amenable to a modification of the non-compete agreement in 1987 under certain conditions, no modification was made before McMurray proposed to be the full-time general manager, *i.e.*, the deadline for the submission of integration statements. He characterized the instant situation as not "unlike one where an applicant is denied integration credit because of inconsistent, contingent or conflicting arrangements or commitments." *Id.*

6. McMurray reiterates his earlier contention that the parties had orally agreed in 1987 to release him from the non-compete restriction in return for forgiveness of further payments under the covenant. He reports that they executed a written agreement in October 1990 (McMurray Exh. 4) with the same terms and conditions as agreed to previously in 1987, and that Miller viewed the agreement as a "formalization of our agreement relating back to the [other station] matter." McMurray Exceptions at 7. McMurray asserts that they did not reduce the agreement to writing earlier because there was no "need for [him] to stop receiving payment ... until after this case is over and [he] commences construction." *Id.* at 9. Alternatively, McMurray contends that if the Commission fails to recognize the validity of the 1987 oral modification, the covenant still presents no obstacle to the construction and operation of the Modesto station because by its own terms, it expires at the latest in July 1993, now well within the eighteen-month period permittees are allowed to construct FM stations under the Commission Rules. McMurray cites to *Miami Latino Broadcasting Corp.*, 5 FCC Rcd 7321 (1990), as support for receiving credit.

7. In *Northland Communications*, 60 RR 2d 776, 777 n.3 (1986), *denying review of* 100 FCC 2d 914 (Rev. Bd. 1985), *aff'd by judgment sub nom. Up North Broadcasting Co. v. FCC*, 814 F.2d 774 (D.C. Cir. 1987), the Commission clarified that integration proposals would be credited only if certain or definite on the date established by the presiding ALJ for finalizing comparative proposals. The object underlying such a policy is "to avoid unfair prejudice to other competing applicants whose comparative positions [are] fixed as of that date and [to] advance[] the need for administrative finality by requiring that applicants' comparative positions be fixed at some identifiable point." *Northland*, 100 FCC 2d at 916 ¶ 3; *see also Daytona Broadcasting Co. Inc.*, 97 FCC 2d 212, 216 (Rev. Bd. 1984) ("comparative licensing proceedings conducted under the *Policy Statement* are far too exhaustive and expensive to allow an applicant to be drawn deeply into a competition for the license, only to be confronted by a competitor whose comparative position has been improved" after the date established for finalizing integration proposals) (subsequent history omitted); *accord, Goodlettsville Broadcasting Company, Inc.*, 8 FCC Rcd 57, 59 ¶ 10 (Rev. Bd. 1992).

8. In the instant case, the record supports the ALJ's finding that McMurray's integration proposal was legally incapable of effectuation on March 28, 1990, the deadline set by the ALJ for freezing the applicants' comparative proposals. *Order Prior to Prehearing Conference*, FCC 90M-499, released March 13, 1990. Belying McMurray's claim that an oral agreement to relieve him of this impediment had been reached in 1987 is Miller's testimony that "there was no change in the agreement. There was a discussion regarding a change in the agreement." Tr. 1564. "That, again, was sometime during the '87 year, mid to late '87, whatever. Frankly, nothing further was ever done. I never heard anything more with that." Tr. 1556.[4] The *Initial Decision* accurately reports:

> [N]o consideration of any kind was paid by McMurray to secure a modification of the agreement [in 1987]. (Tr. 930-932.) . . . No written memorandum of the 1987 discussion exists. (Tr. 925.) No written agreement was executed at that time because "the matter died of inertia" and "the deal was just never struck, never got to the point where a further written agreement between Radio Associates and Mr. McMurray were [*sic*] necessary." (Tr. 1558.) Associates continued to make payments to McMurray

[4] Indeed, Radio Associates continued to treat the covenant not to compete as a depreciable, tangible asset for tax purposes. Tr. 1563.

after the 1987 discussions "because there was no change in the [non-competition] agreement," only a discussion regarding a change in the agreement. (Tr. 1564.)

7 FCC Rcd at 3414 ¶ 70. Although Miller had been amenable to discussing a modification to the agreement when McMurray had been interested in acquiring a Manteca station in 1987, the record shows that neither McMurray nor anyone acting on his behalf took any steps before McMurray made his Modesto integration commitment to ascertain whether Radio Associates continued to be amenable to modifying the non-compete agreement. Miller and McMurray had no further contact about any modification to the non-compete agreement until McMurray's attorney first contacted Miller in August 1990, *see* Tr. 1570-72, several months after the March deadline for filing viable integration statements. *See Order Prior to Prehearing Conference*, FCC 90M-499, ¶ a, released Mar. 13, 1990. Negotiations about the terms of an agreement similar to what had been discussed in 1987 were held between Miller and McMurray's counsel probably in mid-September.[5] Tr. 1569-74; 1585. The fact that Miller contingently agreed in October 1990 to modify the agreement in the event McMurray prevails in this proceeding is unavailing because this agreement occurred after the date comparative proposals were fixed, and its recognition would constitute impermissible comparative upgrading.[6] *See generally Charisma Broadcasting Corp.*, 8 FCC Rcd 864, 867 ¶ 14 (1993) (untimely statement improving integration proposal rejected), *appeal docketed*, No. 93-1188 (D.C. Cir. Mar. 5, 1993). It was incumbent on McMurray to show that the non-compete covenant would not conflict with his integration proposal on the date those proposals were due to be finalized. *Id.* at 866 ¶ 12. That burden was not met; and credit was properly denied. *See, e.g., id.* at 866-867 ¶ ¶ 11-15 (credit denied principal who became congressional candidate after close of hearing, even though candidate lost election prior to *Initial Decision).*

9. McMurray's alternative reliance on *Miami Latino* for credit is misplaced. In *Miami Latino*, the principal entered into a series of employment contracts for hosting radio station talk shows while prosecuting her application for a new television station. The Commission concluded that these contracts did not undermine her integration pledge at the proposed station for two reasons: no contract exceeded the construction period for a new television station provided in the Commission's rules,[7] and the employment for which she was under contract was not inconsistent with her integration commitment. 5 FCC Rcd at 7322 ¶ 7. In other words, the fact that the *Miami Latino* principal was under contract did not at any time preclude her from meeting her integration commitment. The same cannot be said for McMurray in the instant proceeding. When the integration statement finalizing McMurray's proposal was due, McMurray's non-compete agreement had more than three years to run--more than twice as long as the construction period allowed for new FM stations in 47 CFR 73.3598(b). If the non-compete contingency could not be removed, which McMurray had not timely explored, McMurray's ability to integrate was contingent on a protracted proceeding.[8] Although the agreement is now about to end by its own terms because of the time elapsed in this proceeding, such contingent proposals are not credited, even when subsequent events cause the contingency to be removed. *See Charisma Broadcasting Corp.*, 8 FCC Rcd at 867 (integration pledge of congressional candidate not credited even though candidate subsequently lost election because candidate did not timely demonstrate that her integration pledge was a higher priority than elected office, including reelection). *Cf. Woods Communications Group, Inc.*, 7 FCC Rcd 78, 80 (1992) (record did not show definite commitment to integration pledge where school teacher/principal did not explicitly pledge to resign from teaching position if the applicant received the permit; teacher's proposal not credited), *recon. denied*, 7 FCC Rcd 4604 (1992), *appeal docketed sub nom. Caldwell Broadcasting Limited Partnership v. FCC*, No. 92-1343 (D.C. Cir. filed Aug. 6, 1992). Furthermore, McMurray's proposal to be fully integrated is not compatible with his agreement not to engage in broadcasting in an area encompassing Modesto. When he filed his integration statement, McMurray had not reconciled these. *See Charisma; Miami Latino*. He had ample opportunity to explore a release from the covenant prior to the integration cut-off date, but he waited until after that deadline before making any effort to do so, and he only obtained the contingent agreement in October 1990, after the hearing had begun. We affirm the ALJ's ruling denying integration credit to McMurray.

10. *Modesto Communications Corporation.* MCC is a corporation with voting stock held by Elmer M. and Phyllis B. Gunkel and non-voting stock held by Edward J. and Dolores M. Cardoza. 7 FCC Rcd at 3414 ¶ 74. Equity is divided evenly between voting and nonvoting stock. The ALJ awarded full integration credit to MCC for Elmer Gunkel's proposal to serve full time as general manager and Phyllis Gunkel's proposal to serve full time as business manager. BCD has excepted, arguing that the equity struc-

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[5] McMurray may have first contacted Miller's partner about the covenant around August 1990. Tr. 1557, 1566, 1570. In the normal course of business the partner would have referred questions about the covenant to Miller. Tr. 1571. Miller and McMurray have had no direct contact since the discussions in 1987. Tr. 1570.

[6] That the October 1990 letter is not the final agreement is suggested by Miller's testimony that the provision of the October 1990 letter concerning restrictions on McMurray's use of a country format remains open for negotiation and discussion. Tr. 1575.

[7] Although McMurray characterizes the first contract as having a three-year duration, McMurray Exceptions to Initial Decision at 10, "[t]he record establishes that [the principal] signed a two year contract to be a talk show hostess. . . . The contract provided the station with a right of first refusal for a third year." *Miami Latino*, 5 FCC Rcd at 7321 ¶ 6. The principal terminated the first contract before the two years had run and signed a one-year contract at another station. *Id.*

[8] With the adoption of its hearing reforms, the Commission limited the ability of a successful applicant to withdraw integration and divestiture commitments to "global" settlements entered into and filed with the presiding judge before the exhibit exchange date in the case. *Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, 6 FCC Rcd 157, 160 (1990), *modified*, 6 FCC Rcd 3403, 3403 ¶ 6 (1991) (effective Aug. 1, 1991). For a discussion of the fluctuating policy about adherence to integration and diversification commitments after settlement that was applied prior to the hearing reforms, see *WCVQ, Inc.*, 4 FCC Rcd 4079 (Rev. Bd. 1989).

ture is uncertain, the principals will not adhere to the two-tier structure, and the Gunkels have been passive in preparing and prosecuting the application.

11. BCD's challenge to the reliability of the equity structure goes to the financial contributions made by the time of the hearing and expected in the future. It argues that these do not match the equity shares of the Gunkels and Cardozas. Elmer Gunkel testified that he had initially contributed more than Mr. Cardoza as a loan but expected to be paid back, as would Mr. Cardoza for his contributions, once the station was profitable. Tr. 638, 644, 660. He expected Mr. Cardoza ultimately to be "supporting most of the money," a view shared by Mr. Cardoza. Tr. 639, 713-14, 716. Given the thirty-year friendship between Mr. Gunkel and Mr. Cardoza, Tr. 618, Mr. Gunkel's broadcast experience and sweat equity, and Mr. Cardoza's promised financial support, we find no merit to BCD's complaint that the equity arrangement here is unreliable. Both Mr. Gunkle and Mr. Cardoza testified without qualification that the voting and non-voting shareholder groups would each hold fifty percent of the equity regardless of the amount of money loaned to the applicant. Tr. 637, 715. *See Doylan Forney,* 5 FCC Rcd 5423, 5427 ¶ 26 (1990) ("the amount of the general partner's investment relative to that of the limited partners is not, by itself, of decisional significance"), *aff'd by judgment sub nom. Maricopa Media, Inc. v. FCC,* 951 F.2d 1324 (D.C. Cir. 1991), and cases cited therein.[9] BCD's assertion to the contrary is based on pure speculation.

12. BCD's challenge to the two-tier structure relates to speculative and ambiguous statements by Mrs. Gunkel on cross-examination that she did not think anything prohibited her from asking Mr. Cardoza for business advice if she wanted to, Tr. 696, and by Mr. Cardoza on cross-examination that, if asked to build the studio, he might do it. *See* Tr. 722-24;[10] 7 FCC Rcd at 3428 n.23. The ALJ concluded:

> Here, it has not been shown that the Cardozas have been active at any time in the preparation or prosecution of the MCC application. They were not the originators of the project nor did they take an active role in any of the affairs of the applicant. They have been strictly passive investors, and there is no valid basis for attributing their interest. The speculation of what Mrs. Gunkel will do in the future or what Mr. Cardoza will do if asked is not a valid basis to impute the Cardozas' interest for integration purposes.

7 FCC Rcd at 3425 ¶ 170. We agree. Nothing alleged by BCD suggests that the answers in question were anything more than speculation in response to speculative questions. *See Cleveland Television Corporation v. FCC,* 732 F.2d 962, 969 (D.C. Cir. 1984) ("We decline to order the Commission to disregard an applicant's corporate structure on the basis of a mere suspicion, unsupported by the evidence, that the applicant will operate as if no corporate structure existed."); *see generally Isis Broadcast Group,* 7 FCC Rcd 5125, 5136 ¶ 35, *recon. denied,* 8 FCC Rcd 24 (Rev. Bd. 1992), *application for review pending.*

13. Finally, we agree with the ALJ that the roles played by Mr. and Mrs. Gunkel in preparing and prosecuting the application do not undermine their integration proposal. Although Mr. Gunkel has used the professional assistance of an engineer and attorney, he hired the engineer who recommended counsel; "he hired counsel, Tr. 626; he, together with counsel, put together the budget for construction and initial operation; and he prepared the application in long-hand." 7 FCC Rcd at 3424 ¶ 167. As the ALJ rightly concluded from this record, "the arguments questioning Mr. Gunkel's level of involvement are not well founded." *Id.* at 3424-25 ¶ 167. *See generally Oliver Kelley and Mary Ann Kelley,* 6 FCC Rcd 7377, 7379 ¶ 14 (Rev. Bd. 1991) (reliance on expert assistance does not, without more, undermine an integration proposal), *review denied,* 7 FCC Rcd 4239 (1992). Mrs. Gunkel, who will be the business manager, has been less involved in the preparation and prosecution of the application and, as BCD says, the ALJ found her integration credit "[a] closer question." *Id.* at 3425 ¶ 168. Nonetheless, we agree with the ALJ that she is entitled to credit for her integration as business manager. In addition to discussing the application with her husband, she saw the corporate documents, was familiar with the structure and ownership of the corporation, supplied information for the application, attended a budget discussion, handled newspaper publication, handles corporate records and finance, *id.* at ¶ 169, and is a signator on the corporate checking account. Tr. 645. She has no commitments that would conflict with effectuating her integration in a position considered to be management in the *Policy Statement,* 1 FCC 2d at 395. The position as business manager was decided on because she has "always handled the business matters at our household and our businesses." Tr. 683. Her proposed future role is not discredited simply because she played a less significant role than did her husband in developing the application or has allowed him as the proposed general manager to take the lead. *See National Communications Industries,* 7 FCC Rcd 1703, 1705 n.3 (1992); *Eve Ackerman,* 7 FCC Rcd 2493, 2494 ¶ 5 (Rev. Bd.), *review denied,* 7 FCC Rcd 6872 (1992). *See also Religious Broadcasting Network,* 3 FCC Rcd 4085, 4088 ¶ 11 (Rev. Bd. 1988) (applicant's integration proposal rehabilitated in spite of some confusion in applicant's testimony where "there is here no evidence that [the principal] was totally unfamiliar with her application or totally ignorant of her future status or her proposed duties") (subsequent history omitted). *Compare HS Communications, Inc.,* 7 FCC Rcd 6448, 6452 (Rev. Bd. 1992) (integration credit denied

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[9] Thus, the cases on which BCD relies to argue against crediting nebulous or unfixed ownership interests are not relevant here. *E.g., George Henry Clay,* 5 FCC Rcd 317, 319 (Rev. Bd. 1990) (ultimate ownership shares to depend on respective purchases of partnership shares) (subsequent history omitted); *Washington's Christian TV Outreach, Inc.,* 94 FCC 2d 1360, 1365-66 & n.9 (Rev. Bd. 1983) (irrevocable warrants created uncertainty about ultimate ownership); and *Washoe Shoshone Broadcasting,* 3 FCC Rcd 5631, 5635 (Rev. Bd. 1988) (nebulous ownership structure not credited) (subsequent history omitted).

[10] This testimony was qualified by Mr. Cardoza's explanation that Mr. Gunkle was "calling the shots" and that he is not licensed to do contracting work for anyone other than himself and is too busy to do so, although he might do some HVAC work on "a friendship basis," if asked. Tr. 722-23.

where purported dominant decision-maker for applicant appeared to lack any authority over applicant in her own right), *application for review pending.*[11]

14. *BCD Limited Partnership.* BCD is a limited partnership with one general partner, Salvador H. Campos, and two limited partners, Amador S. Bustos and Carlos Duharte. Each partner has one-third of the equity in the partnership. 7 FCC Rcd at 3415 ¶ 87. Although BCD claims that only Campos will be active at the proposed station, the ALJ was not confident that his control would be exclusive of the other partners. *Id.* at 3426 ¶ 178. He, therefore, attributed the equity interests of the other partners for purposes of calculating integration credit and awarded credit only for Campos' one-third interest. BCD has excepted.

15. The facts here are not in dispute. Bustos was active in BCD until the limited partnership agreement was signed. As the ALJ concluded, "[H]is participation permeated the important activities that went into the creation and development of the BCD application." 7 FCC Rcd at 3426 ¶ 177. Bustos learned of the allotment, brought Campos and Duharte into the application, looked for possible sites with Campos, suggested counsel and an engineering consultant, and worked with Campos on the applicant's financing, budget, and business plan.7 FCC Rcd at 3415-16 ¶ ¶ 88-94. When the principals decided to form a limited partnership, he typed the agreement on his computer and changes suggested by counsel were made on his computer. *Id.* at 3416 ¶ 95. The limited partnership agreement was signed on February 29, 1988, and, as the ALJ found, by its terms sufficiently insulated the general partner from the limited partners. *Id.* at 3416 ¶ 95, 3425 ¶ 174. Campos prepared and prosecuted the application thereafter without any participation from the limited partners, except:

> On July 14, 1989, BCD filed an Amendment, dated June 29, 1989, to the application to report the current media interests of its limited partner Amador S. Bustos and his wife Rosalie L. Bustos. (MCC Ex. 6.) The Amendment was written and signed by Mr. Bustos, at the request of BCD's general partner, Mr. Campos, because the Amendment related solely to Mr. Bustos' media interests. Mr. Campos did not know the extent of Mr. Bustos's media interests and believed Mr. Bustos was best qualified to certify what they were. At no other time has Mr. Bustos amended or attempted to amend BCD's application. (BCD Ex. 9.)

Id. at 3416 ¶ 99. This amendment is the issue. Because Bustos prepared and signed it, the ALJ concluded that BCD has not maintained the passivity necessary to insulate the interests of limited partners from attribution in the integration analysis.

16. BCD argues that the ALJ misread the Commission's guidance in *Coast TV*, 5 FCC Rcd at 2752-53, when concluding that BCD had not maintained the necessary insularity between its active and passive owners. In paragraph 15 of its decision the Commission held:

> [W]here a "passive" owner is shown to be *materially involved* in the applicant's activities after the owner has been held out as a passive investor, that owner's interest will be considered for comparative purposes. Where an applicant adopts an ownership structure under which a particular owner is to be a limited partner . . ., that owner's subsequent participation in any aspect of *decisionmaking* raises a question as to whether he will, in accordance with the applicant's ownership structure, have a passive, rather than an active, role in the management of the ongoing licensee.

Id. at 2752-53 (footnote omitted) (emphasis added). BCD complains that, by focusing only on the language in the following paragraph summarizing its analysis,[12] the ALJ failed to consider that Bustos' preparation of an amendment about his own media interests at Campos' request was neither material involvement in the applicant's activities nor participation in its decisionmaking. Modesto and Reinstein support the ALJ's decision because, in their view, writing and signing any amendment to the application crosses the line from passive to active involvement, regardless of the circumstances, and because Bustos was active in the applicant's activities before the limited partnership agreement was executed. They argue that this combination of circumstances casts doubt on the applicant's intent to honor the insulation provisions of the partnership agreement.[13]

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[11] The "sham" or inadequately insulated applications described in *Tulsa Broadcasting Group*, 2 FCC Rcd 6124 (Rev. Bd. 1987) (subsequent history omitted); *Magdalene Gunden Partnership*, 2 FCC Rcd 5513 (Rev. Bd. 1987) (subsequent history omitted); and *Louisiana Super Communications Limited Partnership*, 102 FCC 2d 1293 (Rev. Bd. 1985), if those are the aspects of these multi-party cases that BCD meant the Board to read, bear no resemblance to the case at hand. In the instant proceeding, Mr. Gunkel was the moving force behind the application, and no one other than the Gunkels and the professionals they hired to assist them has had any involvement in the preparation or prosecution of the application.

[12] The Commission explained at 7 FCC Rcd at 2753 ¶ 16 (footnotes omitted):

> [W]here an applicant adopts an ownership structure providing that a previously active owner will now have a passive role and thereafter adheres to that changed ownership structure without exception, the Commission ordinarily has reasonable assurance that the once active owner will not exercise any control or influence over the management of the ongoing licensee. Under those circumstances, we will not attribute the equity interest of a passive owner to the applicant for integration purposes even though that owner may have been active in initiating or financing the application before the applicant adopted an ownership structure specifying a passive role for that owner.

[13] Modesto and Reinstein both describe Bustos' preformation role in the applicant, but neither suggests that BCD's structure is disingenuous or that Campos' participation should not be credited. *See generally Royce International Broadcasting*, 5 FCC Rcd at 7064. Their argument is only that the ownership interests of Bustos and Duharte must be attributed in the comparative analysis because of Bustos' activities regarding the applicant.

17. We agree with BCD that, under applicable Commission precedent, its proposal should be credited. While the Commission is sensitive to the opportunity for abuse provided by the *Anax* policy and, thus, intends to scrutinize passive arrangements like BCD's limited partnership to determine "whether the applicant's described ownership structure accurately reflects the manner in which control will be exercised," *Royce International Broadcasting*, 5 FCC Rcd at 7064, the Commission has recently made clear that not every contact between active and passive owners constitutes a breach of the insulation required to avoid attribution of passive ownership interests. In *Coastal Broadcasting Partners*, 7 FCC Rcd 1432, 1434 (1992), *appeal docketed sub nom. Golden Shores Broadcasting v. FCC*, No. 92-1574 (D.C. Cir. filed Nov. 2, 1992), the Commission rejected arguments that pre-formation activities of a nonvoting stockholder similar to Bustos' activities here belied that owner's status as a passive owner. The Commission explained "that the post-formation record is ordinarily the best evidence of who will control the ongoing licensee. Thus, the manner in which the applicant was formed and the principals' pre-formation activities are probative only if the post-formation record is inconclusive as to who will control the ongoing licensee." *Id.* at ¶ 14, citing *Evergreen Broadcasting Company*, 6 FCC Rcd 5599, 5601 ¶ ¶ 14-16 (1991), *appeal docketed*, No. 91-1511 (D.C. Cir. filed Oct. 18, 1991). In looking at the post-formation record, the Commission considered whether the putative active owner would have "exclusive managerial control over the applicant." *Id.* The fact that a passive owner in *Coastal* had paid one engineering bill at the voting stockholder's express direction did not undermine the applicant's proposal.[14] Likewise here, Bustos' preparation of one application amendment dealing solely with his and his wife's media interests does not rebut BCD's showing that Campos will have exclusive managerial control, where the amendment was prepared at Campos' express direction, and this does not compromise the *Coast TV* requirement that a passive owner have no material involvement in the applicant after the ownership structure is formed.[15] Thus, consistent with *Anax*, BCD is entitled to one hundred percent credit for the full-time integration proposal of Campos.[16]

18. *Thom Reinstein Communications*. Reinstein is a limited partnership with one general partner, Thom Reinstein, and one limited partner, Allen Thomsen, Reinstein's brother-in-law. Each holds fifty percent of the equity. The ALJ awarded Reinstein one hundred percent credit for Mr. Reinstein's promise to be integrated full-time into the management of the station and found him to be the stronger of the applicants entitled to full quantitative integration. The ALJ's award of integration credit is challenged on several grounds: that the limited partnership agreement has not been shown to be sufficient; that Mr. Reinstein's continuing involvement with his production company precludes implementing his full-time commitment to the proposed station; and that Mr. Reinstein is too passive and has too insufficient a financial stake to warrant credit. The Board agrees with the Presiding Officer that these arguments are insufficient. *See* 7 FCC Rcd at 3426-27.

19. No one argues that the limited partner has taken any actions to date that would render the partnership agreement suspect or indicate that Thomsen will be active in the future. *See id.* at 3427 ¶ 183. Instead, McMurray and Modesto challenge the record regarding the agreement itself. McMurray claims that there is no record evidence of some of the provisions required by *Attribution of Ownership*, 97 FCC 2d 997 (1984), *recon. granted in part*, 58 RR 2d 604, 620 (1985), *further recon. granted in part*, 1 FCC Rcd 802 (1986),[17] because Reinstein did not place the agreement itself into evidence and only made assurances about some of the provisions of the agreement in Reinstein Exh. 1, its direct case. However, as stated in Reinstein Exh. 1, Reinstein certified in Section II of its application that "no limited partner would be involved in any material respect in the management or operation of the proposed station." Pursuant to the Commission's instructions to the application form used at the time (FCC Form 301, Oct. 1986), this certification was to the specific insulative provisions required under *Attribution of Ownership*. Reinstein provided copies of its limited partnership agreement during discovery and Thomsen was briefly cross examined on it during the hearing. Tr. 1535-37. The only challenge to its provisions is Modesto's argument that the agreement does not specifically prohibit the limited partner from performing any services for the limited partnership materially relating to its media activities, other than making loans to the partnership or acting as its surety, as required by *Attribution of Ownership*, 58 RR 2d at 620. But, Reinstein stated in its Exh. 1 that its partnership agreement provides in pertinent part:

> No limited partner shall participate in the control or management of the partnership business or have any power to bind the partnership in any contract, agree-

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[14] That passive owner also received carbon copies of materials sent to the active owner by the applicant's counsel and was advised of the applicant's progress during a brief meeting with the active owner at a convention, facts not present here. However, these communications were not material for there was no evidence of any communication from the passive owner to either the active owner or her attorney undermining the active owner's exclusive managerial authority. 7 FCC Rcd at 1434 ¶ 14.

[15] *See Magdalene Gunden Partnership*, 6 FCC Rcd 5976, 5976-77 ¶ ¶ 5, 9, 11 (1991), *appeal docketed sub nom. Marin TV Services Partners, Ltd.*, No. 91-1563 (D.C. Cir. filed Nov. 20, 1991); *Webster-Fuller Communications Associates*, 5 FCC Rcd 4518, 4518 ¶ 3 (1990); *Great Lakes Broadcasting, Inc.*, 7 FCC Rcd 1829, 1830 ¶ 10 (Rev. Bd. 1992), applying the "no material involvement standard" from *Coast TV*.

[16] Compare cases where post-formation activities resulted in attribution; *e.g., National Communications Industries*, 7 FCC Rcd 1703, 1704 ¶ ¶ 6-9 (1992) (providing legal services); *Woods Communications Group*, 7 FCC Rcd at 81 ¶ 22 (passive owner leveraged changes in articles of incorporation augmenting rights of non-voting shareholders); *Marlin Broadcasting of Central Florida, Inc.*, 5 FCC Rcd 5751, 5752 ¶ 12 (1990) (passive owners active in corporate decisions) (subsequent history omitted), *aff'g* 4 FCC Rcd 7945, 7952-53 (Rev. Bd. 1989); *National Communications Industries*, 6 FCC Rcd 1978, 1980 ¶ 14 (Rev. Bd. 1991), *aff'd on this point*, 7 FCC Rcd at 1705 n.4 ; and *Pueblo Radio Broadcasting Service*, 5 FCC Rcd 4829, 4831-32 ¶ 15 (Rev. Bd. 1990) (non-voting shareholder retained signature authority over checking account).

[17] In *Magdalene Gunden Partnership*, 6 FCC Rcd 5976 (1991), *Cotton Broadcasting Company*, 4 FCC Rcd 1781 (1989), and *Daytona Broadcasting Company, Inc.*, 103 FCC 2d 931, 934-35 (1986), the Commission has said that compliance with the safeguards against material involvement set forth in its ownership attribution rules is mandatory in comparative licensing cases for applicants who seek to avoid attribution of the interests of passive owners in either the diversification or the integration analysis.

> ment, compromise or undertaking. No limited partner shall serve as an employee, agent, or independent contractor of the partnership or the general contractor or as an officer, director, or shareholder of a corporate general partner or consult with or advise the general partner with respect to the partnership business.

We agree with Reinstein that this provision adequately insulates the limited partner from providing services to the partnership.[18] We, like the ALJ, are satisfied that Reinstein met its burden with respect to the partnership agreement. *See Gloria Bell Byrd,* 7 FCC Rcd at 7978 ¶ 7 & n.25.

20. We also agree with the ALJ that Mr. Reinstein's ownership of a production company will not prevent him from implementing his integration proposal. *See* 7 FCC Rcd at 3427 ¶ 185. The production company produces a two-hour weekly program, "Portraits in Sound," which takes Mr. Reinstein about three hours each week to produce. *Id.* at 3418 ¶ 115. He has arranged with Pacific Media Group to produce the master tape if Reinstein is awarded the permit,[19] thereby saving about two hours of production time, Tr. 1452, 1514, and he would hire an employee to handle day-to-day matters and serve as an intermediary with Pacific Media, if Reinstein is awarded the permit. 7 FCC Rcd at 3418 ¶ 113. Since 1988 Radio Today Entertainment has handled sales of commercial time, marketing, and national syndication for the program, and Mr. Reinstein expects the arrangement to continue. *Id.* at 3418 ¶ 111. If it does not, he will discontinue the program. Tr. 1516. Although Mr. Reinstein expects to continue the program if awarded the permit, he will spend no more than five hours a week on such program-related tasks as selecting the music, taping his comments, and adding to his library of reusable interviews with recording artists. 7 FCC Rcd at 3418 ¶ 115; Tr. 1453-56. The telephone interviews last about fifteen to twenty minutes, involve little preparation time, and usually are done from his home during the evening. Tr. 1454, 1456, 1515. He selects new material by listening to a small number of new compact discs at home with his wife each week. Tr. 1486, 1514. BCD claims that the ALJ erred in finding Mr. Reinstein's continued involvement with the program will not interfere with his proposed integration, because Mr. Reinstein has said he spends about thirty hours a week in his office, has no one in mind to hire for the day-to-day tasks associated with the program, and is himself essential to the program's value. However, as the ALJ noted, since Mr. Reinstein's arrangement with Radio Entertainment Today has relieved him of the time-consuming responsibilities connected with selling commercials and marketing the program, "Reinstein doesn't do very much" most of the time he is in his office. 7 FCC Rcd at 3427 ¶ 185; Tr. 1459-60; *see* Tr. 1459-60, 1462-63, 1477-87. Unlike *Stanly Group,* 3 FCC Rcd 5017 (Rev. Bd. 1988), cited by BCD in support of its exception, the current demands on Mr. Reinstein are small, and he has presented a credible proposal for reducing them even more if awarded the permit. *See generally, Fresno FM Limited Partnership,* 7 FCC Rcd 4339 (1992) (integration credit awarded where applicant proposed to curtail involvement in advertising firm to five hours a week).

21. BCD additionally disbelieves Mr. Reinstein's commitment to the applicant because he has no financial investment in it and, in BCD's opinion, has not rendered sufficient services to justify his fifty percent share, particularly since he used the services of a broadcast consultant for assistance in preparing the application, and Thomsen paid the bill. But, relying on assistance from a paid consultant is not, by itself, reason to deny integration credit. *Oliver Kelley and Mary Ann Kelley,* 6 FCC Rcd at 7379 ¶ 12. Nor is the relative amount of investment of the general and limited partners, by itself, of decisional significance. *See Doylan Forney,* 5 FCC Rcd at 5427 ¶ 26; *KIST Corp.,* 102 FCC 2d at 292 ¶ 8; *San Joaquin TV Improvement Corporation,* 96 FCC 2d 594, 599 ¶ 6 (Rev. Bd. 1983) (subsequent history omitted). Unlike the "sham" situation described in *Mableton Broadcasting Company, Inc.,* 5 FCC Rcd 6314, 6317 (Rev. Bd. 1990), the only case cited by BCD, Mr. Reinstein is not a veritable stranger who was selected by limited partners to be the general partner at the last minute, although offering no appreciable *quid pro quo* for the ownership share. Here, Mr. Reinstein, a man with broadcast experience and time on his hands (Tr. 1460), learned of the channel and recruited his brother-in-law and long-time friend, a busy farmer with no broadcast experience, to provide financing, which Thomsen did as promised. 7 FCC Rcd at 3417 ¶ ¶ 106-108. Mr. Reinstein used professional help in preparing his application, but, as the ALJ concluded, this does not mean he was not himself an active participant in the process, for in addition to being the moving force behind the application, he was the principal who was active in the preparation and prosecution of the application. *Id.* at ¶ 107, 3426 ¶ 180. The ALJ concluded:

> There is here no strained attempt to create a limited partnership structure to garner enhanced integration credit for minority and/or female ownership. It is a family partnership arrangement which has not been shown to lack reliability or constitute a faulty or artificial structure.

Id. at 3427 ¶ 183. Nothing advanced by BCD shows this conclusion to be in error.

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[18] The ALJ noted:

> The limited partner is a farmer, not a broadcaster, and he has decided to financially underwrite his brother-in-law in seeking a radio station which his brother-in-law will build and operate. There is here no strained attempt to create a limited partnership structure to garner enhanced integration credit for minority and/or female ownership.

7 FCC Rcd at 3427 ¶ 183.

[19] Before applying for the station, Mr. Reinstein had Pacific Media prepare a tape "to see if they were competent." Tr. 1443. "[T]hey did a great job." *Id.*

QUALITATIVE COMPARISON

22. With the crediting of BCD's quantitative integration proposal, there are now three applicants remaining in this proceeding with full quantitative integration: MCC, BCD, and Reinstein. McMurray's lack of quantitative credit removes him from further consideration. *See generally Miracle Strip Communications*, 4 FCC Rcd at 5065-66.

23. In the *Policy Statement*, the Commission explained that the value of integration is increased "if the participating owners are local residents and if they have experience in the field," but that previous broadcast experience is "not so significant as local residence." 1 FCC 2d at 396. The weight to be given to an applicant's local residence background depends on the duration of the residence and where in the service area the integrated owner has lived, for "residence in the principal community to be served will be of primary importance, closely followed by residence outside the community, but within the proposed service area. Proposed future local residence . . . will also be accorded less weight than present residence of several years duration." *Id.* The Commission also gives considerable weight to an integrated owner's past participation in civic affairs as part of his or her local residence background. *Id.; Ronald Sorenson*, 6 FCC Rcd 1952, 1953, *recon. dismissed*, 6 FCC Rcd 6901 (1991). Minority status is also an important consideration in the qualitative analysis, having "equal significance" to the local residence background factor. *Radio Jonesboro, Inc.*, 100 FCC 2d 941, 945 (1985). Like the local residence background factor, "minority ownership is entitled to substantial credit in enhancing an applicant's integration proposal." *Waters Broadcasting*, 91 FCC 2d at 1264.

24. Campos brings to the BCD application his status as an Hispanic male, his promise to move to Modesto if BCD is awarded the permit, and his experience in broadcasting since 1972, both as a non-managerial staff member and, for ten years, an FM station program director.[20] 7 FCC Rcd at 3416-3417 ¶ ¶ 100-102. Thom Reinstein brings to the Reinstein application his six-year Modesto residence and very occasional civic participation before filing the application, his additional post-filing civic participation,[21] and his experience in broadcasting since 1978 at broadcast stations (until 1984)[22] and in producing a syndicated radio program and custom spots, jingles, and station identification packages (since about 1986). 7 FCC Rcd at 3417-19. Thom Reinstein has the advantage under the local residence background factor; Campos has it under the equally significant minority status factor. Both have broadcast experience, but Campos' experience is of overall longer duration and includes more time in management. Although broadcast experience carries less weight in the comparative analysis than local residence or minority status, Campos' superior experience here tips the balance in BCD's favor under the integration analysis. "[I]n a comparative proceeding even a 'slight difference may be decisive when greater differences do not exist.'" *Radio Jonesboro*, 100 FCC 2d at 948 (quoting *Sacramento Broadcasters v. FCC*, 236 F.2d 689, 693 (D.C. Cir. 1956). Reinstein offers coverage superior to that offered by BCD, for Reinstein proposes to serve 68,985 or twenty-six percent more people than BCD and 1,000 square miles or over fifty-four percent more area than BCD, but no underserved areas are covered by these proposals. *Id.* at 3421 ¶ 138. Thus, Reinstein's coverage advantage is very slight and does not overcome BCD's overall advantage for integration.[23] *See, e.g., National Communications Industries*, 6 FCC Rcd 1978, 1982 ¶ 27 (Rev. Bd. 1991) (population advantage of 30,787 warrants very slight preference in well-served area), *modified on other grounds*, 7 FCC Rcd 1703 (1992); *Barton Broadcasting Co.*, 104 FCC 2d 785, 790-91 (Rev. Bd. 1986) (population advantage of 45,000, a 26.6% differential, is very slight). *Family Broadcasting Group*, 93 FCC 2d 771, 779 (Rev. Bd. 1983) (population advantage of 180,712, a differential of more than 30%, is very slight), *rev. denied*, FCC 83-559 (1983).[24] MCC, which has not challenged its comparative ranking behind Reinstein in the *Initial Decision*, at 3427, cannot prevail here for its only qualitative enhancements are the promise of Mr. and Mrs. Gunkel, its integrated principals, to move to Modesto if awarded the permit and Mr. Gunkel's past non-management broadcast experience.[25] *Id.* at 3414-15.

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[20] While continuing his air shift, Campos also served as News Director and Production Manager during some of his tenure at Station KBRG-FM, San Francisco, California, between 1972 and 1980. 7 FCC Rcd at 3417 ¶ 102; BCD Ex. 2, p. 2.

[21] Post-filing activities are given only minimal credit because of the Commission's concern about upgrading an application for comparative advantage. *Colonial Communications, Inc.*, 6 FCC Rcd 2296, 2297 ¶ 11 (1991), *recon. dismissed*, 7 FCC Rcd 674 (1992), *appeal docketed sub nom. Appledore Communications, Inc. v. FCC*, No. 92-1079 (D.C. Cir. filed Feb. 2, 1992); *see Kennelwood Broadcasting Company, Inc.*, 7 FCC Rcd 520 (1992), and cases cited therein at ¶ 4.

[22] While a student at Fullerton College, Mr. Reinstein worked at a noncommercial educational station and, as part of his curriculum, served as production director from January to June, 1980. He did volunteer work as an announcer and interim program director at another noncommercial educational station while in school from June 1980 to January 1981. From October 1981 to September 1984 he was music director and assistant to the program director and had an air shift at KFIV-FM, Modesto, and for a month in 1982 was Program Manager and had an air shift at KFMR-FM, Stockton, California. 7 FCC Rcd at 116.

[23] In *Bechtel v. FCC*, 957 F.2d 873 (D.C. Cir. 1992), the applicant with better coverage of an area already well-served by broadcast stations argued that changes in the legal and factual premises underlying the Commission's integration policy required reevaluation of the weight given to integration in comparative cases. The court faulted the Commission for failing to consider this challenge to its integration policy and remanded the case to the Commission. Similar challenges have not been raised in this case.

[24] The Board explained "that comparative coverage differences are not of substantial importance in determining best practicable service to the public where primary aural services are already abundant throughout the proposed service areas." *Family*, 93 FCC 2d at 779.

[25] The Gunkel's intermittent residence in Modesto ending in 1960, about 28 years before filing their application, is so remote in time as to be of no more than minimal comparative significance. *See Policy Statement*, 1 FCC Rcd at 396, where the Commission explains that residence is an important consideration because it "indicates a likelihood of continuing knowledge

25. ACCORDINGLY, IT IS ORDERED That the Motion to Reopen the Record and Enlarge the Issues Against Thom Reinstein Communications filed September 1, 1992, by BCD Limited Partnership IS DISMISSED as moot.[26]

26. IT IS FURTHER ORDERED That the amendments filed by BCD Limited Partnership on July 7, 1992, October 26, 1992, November 13, 1992, March 12, 1993, and March 26, 1993, and the amendments filed Harry S. by McMurray on October 30, 1992, and January 1, 1993, ARE ACCEPTED; and that the Motion to Strike filed by BCD Limited Partnership IS DENIED.

27. IT IS FURTHER ORDERED That the Application of BCD Limited Partnership (File No. BPH-880301OS) IS GRANTED; and the Applications of Harry S. McMurray (File No. BPH-880301MP), Modesto Communications Corporation (File No. BPH-880301NC), and Thom Reinstein Communications, A California Limited Partnership (File No. BPH-880301OU), ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene
Member, Review Board

SEPARATE STATEMENT OF
BOARD MEMBER NORMAN B. BLUMENTHAL

In rejecting the exceptions of the opponents of BCD Limited Partnership, *see ante* paras. 14-18, the majority engages in a good faith effort to apply prevailing case precedent, most particularly *Coast TV*, 5 FCC Rcd 2751 (1990),[1] in overruling the ALJ's conclusion that BCD's two-tier ownership structure is disingenuous and holding instead that the two "passive" partners (owning 66% of the equity) will cede absolute operational control to the third (33%) partner in the operation of their proposed Modesto station.

While the majority's general analysis is not inaccurate, it tends -- as these cases quite often do -- to ignore the "real world," a condition certainly not lost on the bar, the Commission[2] or the judiciary.[3] In the case before us, one of the partners, Amador S. Bustos, an experienced broadcaster who was very active in forming BCD,[4] pledges to be all but inert in the management of this new Modesto station. Why? Two obvious reasons occur: *first*, Bustos himself has pledged to "integrate" full-time into managing a station he has applied for in Longmont, Colorado;[5] so, *second*, any "integration" proposed by him in this Modesto station would create a critical conflict. Hence, we are to believe, Bustos will be wholly passive, despite his 33% share in this valuable Modesto facility.

No doubt an incurable cynic, I am skeptical that the BCD (you'll notice Bustos's is the lead initial in the applicant's acronym) partners will not breach the Chinese Wall of their limited partnership agreement, just as moviegoers were unsurprised when "It Happened One Night" between Clark Cable and Claudette Colbert. But personal skepticism is not an acceptable basis for a subordinate to question regnant Commission precedent, or the majority's earnest application of the case law to this hearing record.

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of changing local interests and needs." Such knowledge cannot be presumed for those who have been gone for more than a generation.

[26] "An agency, like a court, need not decide questions which are not relevant to its decision." *Deep South Broadcasting Co. v. FCC*, 278 F.2d 264, 266 (D.C. Cir. 1960). Likewise, BCD's exceptions that advocate enlargement of the issues against MCC are moot and need not be considered.

[1] As augmented by subsequent cases such as *Coastal Broadcasting Partners*, 7 FCC Rcd 7063 (1992); *Evergreen Broadcasting Co.*, 6 FCC Rcd 5599, 5601 (1991).

[2] At one point, the Commission seriously considered extinguishing the so-called "*Anax*" Doctrine, which doctrine had spawned an avalanche of bogus two-tiered applicants, *see Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, *see* 6 FCC Rcd 151, 161-162 (1992), but it ultimately decided against abrogation. *See also Anchor Broadcasting Limited Partnership*, 7 FCC Rcd 4566 (1992), *recon. denied*, 8 FCC Rcd 1674 (1993).

[3] *See, e.g., Bechtel v. FCC*, 957 F.2d 873, 880 (D.C. Cir. 1992).

[4] Bustos, *et ux.*, are the licensee of KZTA-AM and KIHS-FM, Yakima, Washington. Bustos is also the President of Z Network and KZSA Broadcasting, the licensee of KZFA-FM, Placerville, California. Until September 22, 1992, he also served as sales manager of California stations KLOK-AM, San Jose, and KBRG-FM, Fremont.

[5] *See Western Cities Broadcasting, Inc.*, MM Docket No. 90-424, a comparative renewal proceeding currently *sub judice* before ALJ Arthur I. Steinberg, where Bustos is challenging the incumbent licensee.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-101

In re Applications of

HARA BROADCASTING, INC. File No. BPH-890316MD

SHARON M. MORAN File No. BPH-890316MF

For Construction Permit for
New FM Station, Channel 231A,
Leland, North Carolina

Appearances

Lewis J. Paper, Esq., on behalf of Hara Broadcasting, Inc.; and *Julian P. Freret, Esq.* and *Christopher D. Imlay, Esq.*, on behalf of Sharon M. Moran.

DECISION

Adopted: May 4, 1993; Released: May 14, 1993

By the Review Board: MARINO (Chairman), BLUMENTHAL, and GREENE.

Board Chairman MARINO:

1. This comparative case currently involves the competing applications of Hara Broadcasting, Inc. (Hara) and Sharon M. Moran to construct a new FM station in Leland, North Carolina. In an *Initial Decision* (I.D.), 7 FCC Rcd 5572 (1992), Administrative Law Judge John M. Frysiak (ALJ) granted Hara's application after disqualifying Moran for lack of candor at the hearing and concluding that, even if Moran were not disqualified, Hara would win on a comparative basis under both the diversification and integration factors. Moran has filed exceptions and Hara has filed contingent exceptions; Moran has also filed a petition to reopen the record and to remand for additional hearing. We have reviewed the I.D. in light of the pleadings and hearing record, and conclude that the ALJ's grant to Hara should be affirmed, albeit on somewhat modified grounds as explained below. Moran's petition to reopen will be denied on the merits, and Hara's contingent exceptions will be dismissed without further discussion because they are premised solely on reversal of the I.D. Neither party has requested oral argument and we have not scheduled it on our own motion because we do not find that such argument would materially assist in resolution of the proceeding.

2. In her exceptions, Moran contends that the ALJ erred in disqualifying her for lack of candor, without benefit of a designated issue, on the basis of statements made in her hearing exhibits and oral testimony. Moran further argues that the ALJ's comparative evaluation of the diversification factor should have squarely favored Moran because Hara owns the only media outlet in Leland whereas Moran's interests derive from her husband's media holdings elsewhere. In addition, Moran alleges error in the ALJ's ruling denying her petition to add reporting and character issues against Hara based on its principal's felony conviction in North Carolina. And, finally, Moran contends that the ALJ denied her due process by improperly refusing to permit cross-examination of Hara's witnesses. Because we believe, for the reasons stated below, that this case turns on the comparative issue, which favors Hara, we need not and do not reach the exceptions raised surrounding Moran's disqualification for testimonial lack of candor. "An agency, like a court, need not decide questions which are not relevant to its decision." *Deep South Broadcasting Co. v. FCC*, 278 F.2d 264, 266 (D.C. Cir. 1960); *Rebecca L. Boedker*, 6 FCC Rcd 2557, 2559 n.2 (1991) (comparative loss obviates need to resolve issues pertaining to loser's disqualification on financial and misrepresentation grounds).[1]

3. Hara is a corporation in which Donn Ansell owns 100% of the stock, all of which is voting. I.D., ¶ 4. Hara is the licensee of AM station WAAV in Leland, North Carolina. WAAV operates both day and night. *Id.* at ¶ 5. Moran is a sole proprietorship. *Id.* at ¶ 13. At the time the comparative cases were frozen in this proceeding, Moran's husband, David Moran, had the following broadcast interests: (a) 51% of the licensee of AM Station WKBA, Vinton, Virginia, 233 miles from Leland; (b) 51% ownership of the licensee of AM station WVZN, Lynchburg, Virginia, 227 miles from Leland; (c) 100% ownership of AM station WMYT, Carolina Beach, North Carolina, located 17 miles from Leland and in the same market; (d) 50% of the AM construction permit for WARO, Claremont, Virginia, 214 miles form Leland; and (e) 100% of the AM construction permit for WLRG, Timmonsville, South Carolina, 109 miles from Leland. *Id.* at ¶ 16. Citing the Commission's *Spousal Attribution Policy*, 7 FCC Rcd 1920, n.2 (1992), the ALJ attributed the broadcast interests of Moran's husband to the applicant. The ALJ assessed both applicants substantial diversification demerits but, considering the greater number of interests attributed to Moran, held that Hara's demerit is not as severe as Moran's. *Id.* at ¶ ¶ 39, 42. It is this latter conclusion that is the subject of dispute between the parties.

4. We agree with the ALJ insofar as he determined that both applicants must be assessed substantial diversification demerits because of their respective media holdings, but we further conclude that since neither applicant's proposal will advance the Commission's underlying diversification objectives, no preference may be awarded. Under the Commission's traditional formulation, media interests in the community of license are given the most weight, followed by interests in the remainder of the service area, and then, by interests in the nation generally. *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 394 (1965). Ordinarily, an applicant with a broadcast station in the community of license would receive a substantial demerit, *see, e.g., Hugh M. McBeath*, 103 FCC 2d 386 (Rev. Bd. 1986), *rev. denied*, FCC 86-292, released June 26, 1986; *WFSP, Inc.*, 99 FCC 2d 444 (Rev. Bd. 1984); *Communications Properties, Inc.*, 92 FCC 2d 45 (Rev. Bd. 1982), *rev. denied*, FCC 83-320, released July 7, 1983, whereas if that interest were in the service area, the weight of the demerit would still be significant but somewhat reduced to moderate to substantial, *see Ramon Rodriguez*, 5 FCC Rcd 4041

(1990), *rev'd on other grounds sub nom. David Ortiz Radio Corp. v. FCC*, 941 F.2d 1253 (1991). Thus, were the only interests before us Hara's station WAAV in Leland and Moran's station WMYT, in Carolina Beach, 17 miles from Leland and in the same market, we would accord Moran a modest comparative preference. *Cf. Radio Greenbrier, Inc.*, 80 FCC 2d 107, 119-121 (Rev. Bd. 1980) (slight preference to applicant owning 40% of daytime-only station eight miles from community of license over applicant owning 100% of full-time, and only, station in community of license). Here, however, this slight difference is eviscerated by the fact that Moran has controlling interests in five area stations, including the one that serves the same broadcast market as the proposed Leland station. In analogous circumstances, in *Bill Garrett Broadcasting Corp.*, 16 FCC 2d 415, 420-421 (1969), where one applicant owned the only broadcast station in the community but its competitor owned seven regional stations, the Commission explained that:

> [O]wnership interests in the community to be served are normally of most significance, but this is not to say that multiple interests outside that community but in the same general region must always be of lesser significance. The total number and nature of media interests must be weighed at the same time as their locations are considered in determining the total impact.

The Commission there held that both proposals would have a substantial adverse impact on the diversification criterion and that neither applicant was entitled to a preference. We believe the same result obtains here. *See also Bay Television, Inc.*, 95 FCC 2d 181, 186-187 (Rev. Bd. 1983) (no preference where grant of neither application will meaningfully advance Commission's diversification policies and objectives), *rev. denied*, FCC 85-58, released March 25, 1985, *aff'd sub nom. Horne TV, Inc. v. FCC*, 786 F.2d 431 (D.C. Cir. 1986); *accord, TRC Communications, Inc.*, 59 RR 2d 92, 94-95 (Rev. Bd. 1985), *rev. denied*, FCC 86-283, released June 9, 1986, *aff'd sub nom. Cascade Broadcasting Group, Ltd. v. FCC*, 822 F.2d 1172 (D.C. Cir. 1987); *Ottumwa Broadcasting Co.*, 92 FCC 2d 1011, 1013-1014 (Rev. Bd. 1982); *Berryville Broadcasting Co.*, 70 FCC 2d 1, 13-16 (Rev. Bd. 1978).[2]

5. Hara was awarded 100% integration credit based on the proposal of its principal, Ansell, to work full time as general manager of the station. Hara's credit was enhanced by Ansell's continuous long-term area residence of almost nineteen years, his substantial record of civic activities, including leadership positions in local organizations, and his broadcast experience at WAAV. I.D., ¶ ¶ 6, 10, 31-32. Hara also received credit for its auxiliary power proposal. *Id.*, at ¶ 33. Moran was also given 100% integration credit for her proposal to serve as general manager of her station. Her only enhancement was her proposal to move to Leland if awarded the grant; she had no record of civic activities, and the ALJ rejected her claimed credit for broadcast experience. *Id.* at ¶ ¶ 18-19, 40-41. In view of this undisputed record evidence, we agree with the ALJ's conclusion, *id.* at ¶ 42, to which Moran does not except, that Hara's integration proposal is decisively more enhanced than Moran's. Accordingly, we find, on the basis of the integration factor, and the auxiliary power proposal, that Hara is the clearly preferred applicant and would provide the best practicable service to the public. *See Policy Statement*, 1 FCC 2d at 394.

6. In this regard, we also deny Moran's exception to the ALJ's refusal to allow cross-examination of Ansell and Jim Whitmeyer, a WAAV employee to whom Ansell intended to delegate managerial authority at WAAV in the event of grant of Hara's application. In opposition to Moran's request for cross-examination, Hara pointed out that Moran made no specific showing of need even though she had had the benefit of Ansell's deposition testimony in which he fully explained his integration plans. Hara Opposition, filed January 3, 1992. In ruling on Moran's December 31, 1991 Notification requesting these witnesses for cross-examination, the ALJ, citing the Commission's *Proposals to Reform the Comparative Hearing Process*, 6 FCC Rcd 157, 162 (1990), *recon. denied*, 6 FCC Rcd 3403, 3404 (1991), held that, "The Commission... proclaimed that witnesses should not be cross-examined unless there is a legitimate expectation that some part of their direct testimony, as reflected in the exhibits, is subject to a question of substantial decisional significance. Moran's submission makes no attempt to comply with the provisions of the new rule [47 C.F.R. 1.248(d)(4)]." *Order*, FCC 92M-43, released January 10, 1992. The ALJ's ruling was in accordance with the recent amendment of 47 C.F.R. 1.248 which clarifies that "ALJs should permit oral testimony and cross-examination only where material issues of decisional fact cannot adequately be resolved" without such procedures or the public interest requires them. *Reform Proposals*, 6 FCC Rcd at 3404. Parties seeking to cross-examine their opponents must make a specific showing to the ALJ supporting their request, and the determination as to whether a particular witness's testimony is needed resides solely in the ALJ's broad discretion to regulate the course of the hearing. *Id.*; 6 FCC Rcd at 162. The ALJ's ruling was correct that Moran did not specifically justify her request in light of the Commission's stringent standards and, thus, was well within the sound exercise of his discretion. *See Edward F. and Pamela J. Levine*, FCC 93R-12, released April 16, 1993, at ¶15; *Radio Lake Geneva Corp.*, 7 FCC Rcd 5586, 5591-92 (Rev. Bd. 1992); *WWOR-TV, Inc.*, 3 FCC Rcd 7175 (Rev. Bd. 1988).

7. After exceptions were filed in this proceeding, Moran, on November 10, 1992, filed a petition to reopen the hearing record and remand for adduction of additional evidence. The petition was prompted by a motion for leave to amend, filed October 30, 1992, by Hara, which reported that Whitmeyer, the proposed replacement for Ansell at WAAV, had left the employ of WAAV and that William Walter Jefferay, Jr., an experienced broadcaster and WAAV's sales manager, will replace Ansell at the AM station in the event of a grant of Hara's application. As a result, Moran contends questions now exist as to whether Hara misrepresented its plans and it is necessary to remand the case in order to test "the *bona fides* of Hara's new integration proposal." Moran Petition, at ¶ 5. In opposition to Moran's petition, Hara attaches a Declaration under penalty of perjury from Ansell in which he states that Whitmeyer only recently informed him on September 4, 1992 of his intention to resign as WAAV's program director, that Ansell has not changed his plans and still intends to resign as general manager of WAAV if Hara's application is granted, and that he has asked Jefferay, WAAV's sales manager, to assume his role at the AM station.[3]

8. We do not believe there is any serious question raised as to whether Hara misrepresented its integration proposal. Based on the uncontroverted record evidence spelling out Hara's proposal, the ALJ found that Ansell, who is cur-

rently general manager of WAAV, where he oversees a staff of approximately fifteen people, will terminate his periodic involvement as an on-air-host at WAAV, reduce or eliminate his civic activities as necessary, and withdraw from all managerial responsibilities in order to serve as full-time general manager of the proposed FM station. I.D., ¶ ¶ 6-8; Hara. Exh. 2. Contrary to Moran's contention, this integration proposal has not changed in any respect. What has changed is that the individual Ansell selected to replace him at WAAV has recently resigned and Ansell has named another employee to be general manager of the AM station. Ansell Declaration, ¶ 5. Moran's attacks on the good faith of Hara's original plans, *e.g.*, whether Whitmeyer ever intended to replace Ansell and whether Jefferay has any broadcast background, Petition to Reopen, at 6-7, are speculative as well as inaccurate, as Ansell explains in his Declaration that he had no knowledge, until Whitmeyer informed him on September 4, 1992, of his intention to resign, and that Jefferay has over 30 years of broadcast experience. Ansell Declaration, at ¶ ¶ 4-5. Thus, we find no material or substantial question raised as to the *bona fides* of Hara's integration proposal which would warrant additional hearing. *See Colonial Communications, Inc.*, 5 FCC Rcd 1967 (Rev. Bd. 1990) (integration credited and motion to reopen to explore basic qualifications denied where applicant proposed to turn over her wholly-owned and operated business to her husband or unnamed third party in order to effectuate her proposal, but subsequently decided to close the business and sell the inventory), *recon. denied*, 5 FCC Rcd 3797 (Rev. Bd. 1990), *rev. denied*, 6 FCC Rcd 2296 (1991), *recon. dismissed*, 7 FCC Rcd 674 (1992); *Bradley, Hand and Triplett*, 89 FCC 2d 657, 662 (Rev. Bd. 1982) ("[W]here... an applicant sets forth a specific integration proposal, does not depart from it, and provides reasonable assurance that it will be carried out, we will credit that proposal."); *cf. Joe L. Aldridge*, 6 FCC Rcd 994 (Rev. Bd. 1991) (integration credited where applicant intended to terminate employment and turn over business to spouse, and had other employees who could fill in for him or could hire additional personnel if needed).

9. Moran's final exception is to the ALJ's *Memorandum Opinion and Order*, FCC 91M-3060, released October 10, 1991, which denied her petition to add reporting and character issues against Hara. Moran's petition was premised on Ansell's arrest and conviction for a "crime against nature," which is a felony in North Carolina. Moran pointed out that Hara did not report this matter on either the Form 314 application it filed in 1988 to acquire WAAV or on the Form 301 application it filed in 1989 in this proceeding, even though both forms require the information. Because Hara's misrepresentation is blatant, Moran argues, it should be disqualified forthwith without need for remand and additional hearing. In opposition to Moran's petition, and in reply to exceptions here, Hara states that at the time of Ansell's arrest in September 1988, he was engaged in negotiating the purchase of WAAV. According to Ansell's Declaration, he discussed with WAAV's general manager, Hannah Dawson Gage, whether this incident would bear on his ability to purchase the station, and, after consulting WAAV's communications counsel, she informed him that the Commission was not interested in this kind of crime and that the matter was not relevant to his qualifications to be a licensee. Accordingly, Hara contends, Ansell acted in good faith in deciding not to report his 1988 arrest or February 1989 conviction. In denying Moran's petition, the ALJ held that Ansell's crime did not involve a false statement or dishonesty, that the Commission's 1986 *Character Policy Statement*, 102 FCC 2d 1179, *modified*, 5 FCC Rcd 3252 (1990), did not identify crimes like Ansell's as relevant to its concerns, and that the Commission has never disqualified an applicant on character grounds for conviction of a crime of this nature. The ALJ concluded that Ansell's non-reporting must be viewed in light of these policies and the Form 301 instructions which refer specifically to the 1986 policy statement.

10. First, we do not take at face value Moran's submission that Hara should be disqualified without benefit of a hearing issue, particularly in light of Moran's strenuous exception to her own disqualification for lack of candor without a specified issue. *See* 47 U.S.C. § 309(e). We agree with the ALJ that no issue was warranted. At the time of Ansell's arrest in 1988 and conviction in 1989, the Commission's governing law, as the ALJ correctly noted, was set out in its 1986 *Character Policy Statement*. Thereunder, and with specific regard to relevant non-FCC misconduct, the Commission said it would focus on an applicant's proclivity to deal truthfully with the agency and to comply with its rules and policies. Accordingly, the Commission stated that it would consider only fraudulent statements to government agencies, criminal convictions involving a false statement or dishonesty, and broadcast-related antitrust violations. 102 FCC 2d at 1195-97, 1200-1203. Ansell's misconduct fit none of these categories. Insofar as the application forms Ansell used called for the reporting of felony charges or convictions in general, they were on their face inconsistent with the *Character Policy Statement* delineating relevant misconduct.

11. Even assuming, *arguendo*, however, that Ansell should have reported the pendency and ultimate disposition of the felony charge within thirty days pursuant to Hara's general reporting obligations under 47 C.F.R. 1.65, nevertheless, no issue would be called for. Under longstanding Commission guidelines, a petitioner must support an inquiry into a reporting violation by a *prima facie* showing that the unreported facts are of decisional significance, that an intent to conceal is present, or that there is a pattern of repeated violations or other significant carelessness. *Merrimack Valley Broadcasting, Inc.*, 99 FCC 2d 680, 683 n.9 (1984). Here, there was no showing of decisional significance since, as noted, Ansell's crime was not a matter within the purview of the Commission's character policies at the time; there was no indication of deliberate intent to mislead the Commission in view of Ansell's plausible and unrebutted explanation that he acted on the specific advice of WAAV's general manager and legal counsel that the information was not relevant to the Commission's concerns; and there is no evidence of a pattern or other serious carelessness. *See Coast TV*, 5 FCC Rcd 6720, 6723 (Rev. Bd. 1990).

12. Finally, while the Commission's 1990 modification of its *Character Policy Statement* extended the range of relevant non-FCC misconduct to embrace all felony convictions, at the same time the Commission recognized, of necessity, that not all convictions for serious crimes are equally probative of an applicant's propensity to conform to FCC rules and policies, 5 FCC Rcd at 3252.[4] Accordingly, the Commission specified that the traditional mitigating factors must be considered in particular cases, which include the willfulness, frequency, currentness, and seriousness of the misconduct, overall record of compliance with FCC rules and policies, and rehabilitation. *Id.; see* 102 FCC 2d at 1227-29; *Capitol City Broadcasting Co.*, 8 FCC Rcd 1726, 1733 (Rev. Bd. 1993). Moran, who bore the

burden of establishing the need for a character issue, made no showing whatever with regard to any of these factors; and in further view of the ALJ's unchallenged observation that the Commission has never disqualified an applicant on the basis of a crime such as Ansell's, we conclude that no further hearing is called for.

13. ACCORDINGLY, IT IS ORDERED, That the motion for leave to amend, filed October 30, 1992, by Hara Broadcasting, Inc., IS GRANTED and the amendment IS ACCEPTED; and that the petition to reopen hearing record and remand for adduction of additional evidence, filed November 10, 1992, and the motion to strike opposition to petition to reopen, filed November 30, 1992, by Sharon M. Moran, ARE DENIED, and

14. IT IS FURTHER ORDERED, That the application of Hara Broadcasting, Inc. (File No. BPH-890316MD) for a construction permit for a new FM station in Leland, North Carolina IS GRANTED, and the application of Sharon M. Moran (File No. BPH-890316MF) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

FOOTNOTES

[1] The ALJ disqualified Moran because he found that she had mischaracterized her broadcast experience in her direct case Exhibit 6 and in her Integration Statement, and had been evasive at the hearing when confronted on cross-examination with inconsistencies between her deposition testimony and her hearing testimony. Relying on *Richardson Broadcasting Group*, 7 FCC Rcd 1583 (1992), where the Commission held that, "While many of the matters about which [the applicant] either was evasive or deceptive individually may be of little moment, collectively they demonstrate a pattern of evasiveness and false testimony clearly indicating a willingness to deceive the Commission to gain a perceived advantage", the ALJ essentially concluded that Moran's false statements in the course of the hearing process were disqualifying. I.D., ¶ ¶ 34-38. *See RKO General, Inc. v. FCC*, 670 F.2d 215, 234 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 927 (1982); *Old Time Religion Hour, Inc.*, 95 FCC 2d 713, 719 (Rev. Bd. 1983), *rev. denied*, 57 RR 2d 1147 (1985), *appeal dismissed sub. nom. Alden Communications v. FCC*, No. 85-1207 (D.C. Cir. October 20, 1987).

[2] Other cases advanced by Moran to support its position are plainly inapposite. Thus, in *J.T. Parker Broadcasting Corp.*, 4 FCC Rcd 7764 (Rev. Bd. 1989), *rev. denied*, 5 FCC Rcd 4651 (1990), the comparative preference was awarded to the applicant with a single daytime-only station in the service area because its opponent had multiple broadcast holdings including a station in the community of license and interests in three stations within 60 miles of the community. In *CJL Broadcasting, Inc.*, 95 FCC 2d 544 (1983), the applicant with a daytime-only station in the market was preferred over the applicant with a full-time station in the market in addition to interests in two non-area stations. And in *Hampshire County Broadcasting Co., Inc.*, 99 FCC 2d 600 (Rev Bd. 1984), *rev. denied*, FCC 86-100, released March 20, 1986, *reaffirmed*, 3 FCC Rcd 6137 (1988), the losing applicant owned the only station in the community whereas a 50% owner of its competitor had ownership interests in three stations not involving regional concentration or overlap with the proposed station.

[3] In addition to Hara's opposition, filed November 23, 1992, the Board has before it a motion to strike the opposition, filed November 30, 1992, by Moran, an opposition to the motion to strike, filed December 9, 1992, by Hara, and a notice of filing, submitted December 21, 1992, by Hara. The notice of filing, which contains Ansell's original Declaration filed with Hara's opposition of November 25, 1992, will be accepted, and the motion to strike, which quibbles with the timeliness of the opposition, will be denied. Hara's October 30, 1992 amendment will be accepted for informational purposes.

[4] Under federal law, a felony is defined as a crime punishable by death or imprisonment of more than one year. 18 U.S.C. § 1. Ansell received a suspended sentence and was placed on probation. Hara states that Ansell is gay and that if the 1988 incident had involved a woman instead of another man, no crime would have been involved. Hara Reply Br. at 20.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 92-154

In the Matter of

Amendment of the Amateur Service
Rules to Include Novice Class
Operator License Examinations
in the Volunteer-Examiner
Coordinator Examination System.

REPORT AND ORDER

Adopted: May 3, 1993; Released: May 14, 1993

By the Commission:

I. INTRODUCTION

1. On July 13, 1992, we adopted a *Notice of Proposed Rule Making* (Notice)[1] in the above-captioned proceeding. In the *Notice*, we proposed to amend the amateur service rules to place the responsibility for the preparation and administration of entry-level Novice Class operator license examinations under the volunteer-examiner coordinator (VEC) system. This *Report and Order* adopts the rules substantially as proposed.

2. Currently, each examination for an amateur operator license, except the Novice license,[2] is administered at a session coordinated by one of the eighteen VECs. Under this system, the examination is administered by three volunteer examiners (VE) accredited by the VEC. An examination for a Novice license, however, is administered at an *ad hoc* session by two licensees selected by the examinee. In the interest of integrity, simplification, and efficiency, we proposed to place the responsibility for the preparation and administration of Novice license examinations in the VEC system.

II. COMMENTS

3. The two most active VECs support our proposal.[3] The W5YI-VEC states that it is time to abolish the separate Novice examination system and incorporate it into the VEC System. It is convinced that the use of accredited VEs in the VEC system would improve the integrity of the Novice examination process and minimize irregularities.[4] The American Radio Relay League, Inc. (ARRL)[5] sees advantages that would flow from including Novice Class examinations in the VEC system. It believes that the application error rate would decrease and that more efficiency would result because the Commission would have to interact administratively with only a few VECs, rather than deal with thousands of examiners who are not accredited or coordinated by a VEC.[6]

4. Two ancillary matters are raised in the comments and reply comments filed in this proceeding.[7] The first matter is whether VECs and VEs may accept reimbursement for their out-of-pocket expenses incurred while administering Novice license examinations. Second, some commenters believe that the VEC system could pose an examination hardship in sparsely-populated areas and that General Class licensees should be allowed to administer the Technician as well as the Novice license examinations.[8] These matters are discussed below in greater detail.

5. Our proposal permitting VEs and VECs to recover out-of-pocket costs incurred in preparing, processing, administering or coordinating Novice examinations drew mixed responses. Some commenters oppose any reimbursement fee for a Novice license examination,[9] while one commenter suggests that Novice examinees under 18 years of age not be subject to the reimbursement provision.[10] Other commenters, however, favor allowing the administering VEs to recover their out-of-pocket costs from Novice license examinees.[11] Although ARRL states that it takes no position on this matter, it does request that the Commission clarify whether a VEC could waive reimbursement from an entire class of examinees for a year, provided it does so for all examinees for a particular class of license in all areas where it administers examinations.[12]

6. Several commenters favor[13] allowing General Class licensees to administer examinations for Technician licenses as well as examinations for Novice licenses. One commenter points out that allowing General Class licensees to administer Technician license examinations is in accordance with our statutory authority concerning the duties of

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[1] 7 FCC Rcd 4608 (1992).

[2] The five classes of amateur operator licenses in descending order are Amateur Extra, Advanced, General, Technician, and Novice. The Amateur Extra Class operator license is the highest class license conveying the most operating privileges while the Novice Class operator license is the lowest class license with the least operating privileges.

[3] The W5YI-VEC and the VEC organization of The American Radio Relay League, Inc. coordinated almost 80 percent of the examinations administered in the VEC system in 1992.

[4] Comments of W5YI-VEC at 2 and 3.

[5] The ARRL/VEC is a branch of the American Radio Relay League, Inc. It is separate from other ARRL activities.

[6] ARRL Petition for Rule Making, incorporated by reference into its Comments, at p. 8.

[7] The late-filed reply comments of W. Hugh Toole and the Artic Amateur Radio Club, Inc. (AARC) are being considered as permissible *ex parte* presentations. *See* Section 1.1202(b)(2) of the Commission's Rules, 47 C.F.R. § 1.1202(b)(2).

[8] The Novice Class and the Technician Class operator licenses are entry-level licenses. They both require the passing of the 30 question written examination element 2. The Novice Class operator license is for persons who cannot also pass the 25 question written element 3(A), but who can pass the slow speed telegraphy examination element 1(A).

[9] Comments of Richard E. Humston at 1, Robert May II at 1 and 2, William L. Enter, Sr. at 1, and Steven L. Karty at 1.

[10] Comments of Dennis G. Eksten at 1.

[11] Comments of Gordon Girton at 2, and W5YI-VEC at 3. The W5YI-VEC stated that while it supported a reimbursement fee for Novice examinations, such a fee should not necessarily be required.

[12] Comments of ARRL at 3.

[13] Comments of W5YI-VEC at 4 and 5, Ray Adams at 6, Gordon Girton at 1, and Jim Rinehart at 1.

VEs.[14] Another commenter, however, opposes the use of General Class licensees in the VEC system on the ground that the current practice of using only VEs who hold Amateur Extra and Advanced Class licensees should not be disturbed.[15]

7. Another matter raised by the commenters concerning administration of Novice Class operator license examinations in the VEC system is the hardship that could be caused to examinees in remote areas, because an additional VE would be required.[16] One commenter, moreover, suggests that only one VE be required for a Novice examination administered in Alaska because of the absence of highways, the rugged terrain, and the fact that air travel must be relied on.[17] The ARRL states that no matter how many examination opportunities are available, there will always be some type of hardship for those in a rural environment. It notes that difficulties of arranging an examination session administered by three VEs, rather than two, in Alaska should not influence a decision on whether Novice examinations should be brought within the VEC system. Further, it states that a significant effort would be made by its VEC organization to ensure that there are expanded examination opportunities for persons in all rural areas.[18]

III. DISCUSSION

Novice Class operator license examinations in the VEC system

8. There is convincing support for placing the Novice Class Operator license examinations in the VEC system. The examination elements required for the Novice license are already being administered in the VEC system because they are also requirements for other classes of amateur operator licenses. With the advent of the codeless Technician Class, however, there has been a marked decline in interest for new Novice licenses.[19] To help standardize and simplify the license qualification process, we are amending the rules to place the Novice license examinations in the VEC system. Administering all amateur operator license examinations under the superior VEC system will avoid the confusion that now exists because two different systems are used. The VEC system, furthermore, is much more efficient than the Novice system. The oversight provided by the VECs results in far fewer administration discrepancies and application errors than the Novice system.[20] The data kept by the VECs provide a timely overview of the examination process and a means to gauge the effectiveness of the examination system. Additionally, by eliminating the separate certifications by examiners administering Novice license examinations under the *ad hoc* system, the license application Form 610 can be streamlined.

VE and VEC Reimbursement

9. The VEs and VECs donate their time and talent in preparing, administering, and coordinating examinations. There is no valid reason to require them, in addition, to absorb the costs of providing these valuable benefits to the examinees. They are permitted to accept reimbursement only for their actual out-of-pocket costs and must certify annually to the Commission that all costs for which reimbursement was obtained were necessarily and prudently incurred.[21] The maximum allowable reimbursement fee assures that they perform their duties without incurring any unnecessary expenses.[22] This fee, moreover, has not hampered the growth of the other license classes, for which reimbursement is permitted. We do not believe that such a modest fee will be a significant disincentive to obtaining a Novice Class license.

10. In response to the question posed by the ARRL regarding waiver of the fee, there are two methods the VEs and VECs use for determining the actual reimbursement fee.[23] Under the examination-by-examination method, they simply recover their actual out-of-pocket costs for coordinating, preparing, and administering each particular examination. Under the annual method, during the calendar year they charge every examinee the same fee based upon their forecasts of expenses, adjusted by any shortage or surplus from the previous year. The examination-by-examination method allows the VEs and the VECs the option of not recovering out-of-pocket costs from any particular examinee. The annual method does not allow such an option. VEs and VECs, therefore, when using the examination-by-examination method, can elect not to recover their out-of-pocket costs when administering or coordinating any examination, but cannot charge a fee exceeding their out-of pocket costs for some examinations to offset a lower fee, or no fee, for other examinations.

Administering examinations in remote areas

11. Sparsely-populated areas, by their nature, often involve some higher degree of inconvenience in matters requiring human assistance than do other locales. The presence of three administering VEs at each examination session, however, is the cornerstone of the VEC system. They provide for cross-checking of answers to examination questions to make certain that they are correct, for assuring proper completion of the license application form, and for

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[14] Comments of W5YI-VEC at 4.
[15] Comments of Joe P. McDonald at 1.
[16] Comments of Roger Hansen at 1 and 2, Harvey Rookus at 1, Robert C. Wilson at 1, Robert O. Baker, Sr. at 1, and Robert O. Baker, Jr. at 1.
[17] Comments of William J. Raynsford at 2.
[18] Reply comments of the ARRL at 4 and 5.
[19] In calendar year 1992, for example, there were only 10,704 Novice Class operator licenses issued. For the same period in 1990, the last full year preceding the introduction of the codeless Technician Class operator license, there were 24,398 Novice Class operator licenses issued.
[20] In calendar year 1991, the number of errors on application forms filed through the VEC system was a very low 0.8 percent. For the same period, the number of errors on Novice applications was 9.4%.
[21] *See* Section 4(f)(4)(J) of the Communications Act or 1934, as amended, 47 U.S.C. § 154(f)(4)(J). *See also Report and Order* in PR Docket No. 84-265, adopted July 12, 1984, 56 RR 2nd 662 (1984).
[22] Public Notice, Released October 30, 1992, 7 FCC Rcd 6878 (1992). For 1993, the maximum allowable fee is $5.60.
[23] *See* 3.6.2.1 and 3.6.2.2, Instructions for Volunteer-Examiner Coordinators, Revision D, December 3, 1992, published by the VECs. The custodian is R.C. Smith, Greater Los Angeles Ama-

minimizing the likelihood of fraud or abuse.[24] Rather than reducing the number of administering VEs to two, we believe a better approach would be to authorize General Class licensees to also administer the Technician examinations, as suggested in the comments, in addition to continuing to administer the Novice examinations. This will provide a pool of almost 300,000 possible VEs[25] to administer examinations for the two classes of license for which the most VEs are required[26] thereby making it easier to offer examinations in less populated areas. For these reasons, the rules that we adopt herein specify that General Class licensees may administer examinations to Technician Class as well as to Novice Class examinees.

12. While VEs administer examinations everywhere in the United States and also internationally, Alaska is one of only 14 states where the headquarters of a VEC is located.[27] The Anchorage Amateur Radio Club coordinates examination sessions on a regular basis at many locations in Alaska.[28] It also provides for sessions at other locations occasionally.[29] It was, in fact, the first VEC to be authorized anywhere.[30] The ARRL/VEC, furthermore, intends to expand examination opportunities in Alaska. The number of examination opportunities everywhere, moreover, will grow as a result of our decision allowing General Class operator licensees to administer both Technician and Novice operator license examinations, and permitting VECs and VEs to be reimbursed for their out-of-pocket expenses when coordinating and administering Novice examinations.[31] We believe that amateur operator license examinees will continue to be well served by the VECs and their accredited VEs.

IV. CONCLUSION

13. In summary, we have decided to amend the amateur service rules to place the responsibility for the preparation and administration of Novice Class operator license examinations under the VEC system and to allow recovery of out-of-pocket costs for coordinating and administering such examinations. We, therefore, adopt the proposed rules in this proceeding and also include authorization for General Class licensees to administer Technician Class license examinations.

V. ORDERING CLAUSES

14. Accordingly, IT IS ORDERED that effective **July 1, 1993,** Part 97 of the Commission's Rules, 47 C.F.R. Part 97, IS AMENDED as set forth below. Authority for this action is found in Sections 4(f)(4)(A), (B), and (J), 4(i), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(f)(4)(A), (B),and (J), 154(i), and 303(r).

15. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 97 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

Part 97 - Amateur radio service

1. The authority citation for Part 97 continues to read as follows:

Authority citation: 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§ 154, 303. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. §§ 151-155, 301, 609, unless otherwise noted.

2. Section 97.507(c) is revised, paragraph (d) is removed, and paragraph (e) is redesignated as paragraph (d) to read as follows:

§ 97.507 Preparing an examination.

* * * * *

(c) Each telegraphy message and each written question set administered to an examinee for an amateur operator license must be prepared, or obtained from a supplier, by the administering VEs according to instructions from the coordinating VEC.

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teur Radio Group VEC.

[24] *Report and Order* in PR Docket No. 83-27, adopted September 22, 1983, 54 RR 2d 1068 (1983).

[25] As of January 26, 1993, there were 125,568 General, 110,089 Advanced, and 61,615 Amateur Extra Class licensees.

[26] In 1992, there were issued 10,704 Novice Class operator licenses and 41,703 Technician Class operator licenses. The latter included 33,372 new Technician licenses and 8,331 Technician licenses obtained by Novice licensees.

[27] The other states are Alabama, Connecticut, California, North Carolina, Illinois, Louisiana, Hawaii, Maryland, Wisconsin, West Virginia, Missouri, Tennessee, and Texas.

[28] In 1992, there were 1,084 elements administered to 638 examinees in Alaska. The examination sessions were coordinated by the Anchorage Amateur Radio Club, the ARRL/VEC, and the W5YI-VEC.

[29] Comments of Anchorage Amateur Radio Club, Inc./VEC at 1 and 2. Last year in Alaska, 188 persons qualified for Technician licenses under the VEC system compared to only 63 persons who qualified for Novice licenses under the *ad hoc* system.

[30] The Anchorage Amateur Radio Club was designated a VEC on February 27, 1984.

[31] As of January 26, 1993, 521 Advanced, and 293 Amateur Extra Class licensees in Alaska were eligible to be accredited to administer operator license examinations. With these rule amendments, 632 General Class licensees in Alaska could also be accredited to administer operator license examinations in the VEC system.

* * * * *

3. Section 97.511 is revised in its entirety to read as follows:

§ 97.511 Amateur operator license examination.

(a) Each session where an examination for an amateur operator license is administered must be coordinated by a VEC. Each administering VE must be accredited by the coordinating VEC.

(b) Each examination must be administered by 3 VEs, each of whom must hold an FCC-issued amateur operator license of the class specified below:

(1) For a Novice or Technician Class operator license examination, the administering VEs must hold Amateur Extra, Advanced, or General Class operator licenses; and

(2) For a General, Advanced, or Amateur Extra Class operator license examination, the administering VEs must hold Amateur Extra Class operator licenses.

(c) The administering VEs must make a public announcement before administering an examination for an amateur operator license. The number of candidates at any examination may be limited.

(d) The administering VEs must issue a CSCE to an examinee who scores a passing grade on an examination element.

(e) Within 10 days of the administration of a successful examination for an amateur operator license, the administering VEs must submit the application to the coordinating VEC. If telegraphy element credit is claimed under Section 97.505(a)(5), the physician's certification and the patient's release on the license application, Form 610, must be completed.

4. Section 97.513 is removed and reserved.

5. Section 97.521(c) is revised to read as follows:

§ 97.521 VEC qualifications.

* * * * *

(c) Agree to coordinate examinations for any class of amateur operator license;

* * * * *

6. Section 97.527 is amended by revising paragraph (a), by removing paragraph (c), and by redesignating paragraphs (d) through (g) as paragraphs (c) through (f) to read as follows:

§ 97.527 Reimbursement for expenses.

(a) VEs and VECs may be reimbursed by examinees for out-of-pocket expenses incurred in preparing, processing, administering, or coordinating an examination for an amateur operator license.

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 92-125

In the Matter of

Amendment of the Aviation Rules (Part 87) to authorize the use of the frequency 406.025 MHz for Emergency Locator Transmitters (ELTs) — RM-7611

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 3, 1993; **Released: May 13, 1993**

By the Commission:

I. INTRODUCTION

1. This Report and Order amends Part 87 of the Rules, 47 C.F.R. Part 87, to authorize the use of the frequency 406.025 MHz for emergency locator transmitters (ELTs) on aircraft.[1] This action also adopts standards for 406 MHz ELTs similar to those governing emergency position indicating radiobeacons (EPIRBs).

II. BACKGROUND

2. Emergency radiobeacons designed to transmit distress signals on 121.500 MHz and 243.000 MHz[2] (hereafter 121.5 MHz ELTs) transmit continuous signals that are amplitude modulated with an audio swept tone and provide distress alerting and guidance (homing) assistance in emergency situations. Emergency radiobeacons designed to transmit distress signals on 406.025 MHz (hereafter 406 MHz ELTs) transmit short, digital signals to provide distress alerting and homing assistance in emergencies. Additionally, the digital signal in a 406 MHz ELT contains information regarding the type of emergency, the country and identification code of the aircraft in distress, and other information to facilitate search and rescue (SAR) operations.

3. The United States, Canada, France and the Soviet Union launched COSPAS/SARSAT[3] satellites which monitor wide areas of the globe for distress signals on 121.500 MHz, 243.000 MHz, and 406.025 MHz. Signals from 121.5 MHz ELTs can only be detected and relayed to SAR personnel when a COSPAS/SARSAT satellite is in range of both the 121.5 MHz ELT and a rescue coordination center (RCC). There are, therefore, "blind spots" where distress signals from 121.5 MHz ELTs can not be relayed to an RCC. The 406.025 MHz signals, however, can be detected and stored on COSPAS/SARSAT satellites and retransmitted to RCCs when satellites are in range.

4. The National Oceanic and Atmospheric Administration of the United States Department of Commerce (NOAA) requested the Commission to authorize the use of the frequency 406.025 MHz for ELTs.[4] NOAA is responsible for operating the Mission Control Center that detects and computes the location of emergency beacons using the COSPAS/SARSAT satellite system. The COSPAS/SARSAT satellite system has progressed to a fully operational international system with 18 nations participating and is capable of detecting and computing the location of 406 MHz radiobeacons. According to NOAA, the system was instrumental in the rescue of 1,607 people as of October 30, 1990. NOAA indicated that potentially greater benefits would be derived from the implementation of the 406.025 MHz ELT.

5. On May 22, 1992, we adopted a *Notice of Proposed Rule Making* (*Notice*)[5] proposing to authorize the use of the frequency 406.025 MHz for ELTs. In the *Notice*, we also proposed that ELTs be required to comply with the technical standards in the Radio Technical Commission for Aeronautics (RTCA) document "Minimum Operational Performance Standards 406 MHz Emergency Locator Transmitters (ELTs), Document No. RTCA/DO-204" (RTCA DO-204). Additionally, we sought comment on 1) whether 406 MHz ELTs should be required to have an integral 121.500 MHz homing beacon; 2) whether there are international technical requirements not covered in RTCA's technical standards; 3) whether ELTs capable of operating on 406.025 MHz should be certified as meeting COSPAS/SARSAT standards by an independent laboratory, and finally, 4) whether registration in the NOAA database should be made mandatory for ELTs. In response to the *Notice*, we received nine comments.[6] The commenters favor adopting the rule amendments substantially as proposed.

III. DISCUSSION

A. Use of 406.025 MHz for ELTs

6. The commenters overwhelmingly support authorizing

[1] Emergency position indicating radiobeacon stations are used to send distress signals that alert search and rescue personnel. In the United States such beacons are named emergency locator transmitters (ELTs) when carried on aircraft and emergency position indicating radiobeacons (EPIRBs) when carried on ships. ELTs and EPIRBs transmit distress signals; EPIRBs on 121.500 MHz, 243.000 MHz and 406.025 MHz and ELTs currently on 121.500 MHz and 243.000 MHz.

[2] These frequencies are allocated internationally for use by emergency beacons such as EPIRBs and ELTs. *See* Radio Regulations, No. 3259, (International Telecommunications Union, 1990). The aviation industry typically refers to these ELTs as 121.5 ELTs.

[3] COSPAS is an acronym for a Russian phrase meaning space system for search and distress vessels. SARSAT stands for search and rescue satellite-aided tracking.

[4] RM-7611, Petition filed on January 17, 1991, by the National Oceanic and Atmospheric Administration of the United States Department of Commerce (NOAA), Public Notice No. 1836 (February 7, 1991)

[5] PR Docket No. 92-125, 7 FCC Rcd 3448 (1992).

[6] The following parties filed comments: NOAA, U.S. Coast Guard, Department of the Air Force, National Aeronautical and Space Administration (NASA), Aircraft Owners and Pilots Association, Air Line Pilots Association, W.A. Street of MPR Teltech Ltd., Al Coppin of MPR Teltech Ltd., and Edward S. Craig.

the use of 406.025 MHz for ELTs.[7] The Coast Guard, citing its experience in aeronautical SAR between 1986 and 1991, states it participated in 1715 operations in which aircraft needed assistance, resulting in 726 lives saved.[8] The Coast Guard contends that if the response time to these distress calls could be shortened many more lives could be saved. Based on its experience with the 406 MHz EPIRBs, the Coast Guard believes that the carriage of 406 MHz ELTs will result in much shorter response time in distress cases and concludes that 406.025 MHz should be authorized for ELTs.[9] The Department of the Air Force (Air Force) notes its experience with 121.5 MHz ELTs and states that 406 MHz ELTs have great advantages over 121.5 MHz ELTs.[10] NOAA notes that the results of a study it conducted indicate that additional advantages of the 406 MHz ELT over the 121.5 MHz ELT are a potential savings of an additional nine lives per year as well as an estimated $5.4 million per year in SAR operating costs.[11] Accordingly, we are authorizing the use of 406.025 MHz for ELTs. Operating authority will be subsumed under existing aircraft station licenses, and no application for modification of existing license will be necessary.

B. 121.500 MHz homing

7. The Air Force, Coast Guard and NASA support the requirement that the 406 MHz ELT have an integral 121.500 MHz homing capability. NASA states that federal, state, local and volunteer SAR forces are currently equipped with 121.5 MHz homing equipment but do not have the capability to home on 406.025 MHz. Further, NASA notes that although the 406 MHz beacon is accurate to approximately 2 kilometers, an additional homing signal is needed by rescue personnel in the final phase of the SAR operation. The alternative of homing on the 406 MHz signal is not practical because of the lack of equipment and experience in homing on a burst signal (1/2 second transmission every 50 seconds). Requiring homing on 406 MHz would delay the implementation of 406 MHz ELTs and result in substantial cost to federal, state, local and volunteer SAR organizations.[12] In view of the strong support in the comments, we are requiring that 406 MHz ELTs employ low power 121.500 MHz transmitters for homing. This approach is consistent with the approach taken with the 406 MHz EPIRB for use on board ships and boats.

C. International Technical Standards & Certification by Independent Laboratory

8. In the *Notice* we proposed that ELTs be required to comply with RTCA DO-204. The Coast Guard, NOAA, and NASA filed comments supporting our proposal. MPR Teltech Ltd. (MPR), while agreeing with our proposal, contends that the -50 dB spurious emission limit contained in RTCA DO-204 is unduly restrictive and recommends that it be changed to agree with the 406 MHz EPIRB spurious emission limit of -30 dB. We agree and note that the international Radio Regulations do not specify a limit for spurious emissions from ELTs.[13] We are amending the rules to require compliance with RTCA DO-204 and to reflect the new limit for spurious emissions.

9. We also asked questions about whether there are any international requirements not covered in the RTCA DO-204 technical standards. The commenters agree that the international requirement for certification by an approved COSPAS/SARSAT test facility to meet the COSPAS/SARSAT 406 MHz Distress Beacon Type Approval Standard (C/S T.007) was omitted from RTCA's technical standards. This testing is required to meet U.S. commitments under the COSPAS/SARSAT Intergovernmental Agreement (Agreement). NASA and NOAA emphasize that the United States must meet its commitments to ensure the ELTs are compatible with the COSPAS/SARSAT satellite system.[14] NASA points out that the COSPAS/SARSAT testing procedure examines two important certification requirements, frequency stability and signal coding, thereby assuring that signals transmitted by the beacons are correct and detectable by the satellite.[15] Additionally, the Coast Guard recommends that further electrical and environmental testing be performed by an independent laboratory to ensure reliability.[16] We agree with the commenters' views that 406 MHz ELTs must meet our national requirements as well as be compatible with COSPAS/SARSAT. Accordingly, we are requiring certification by a COSPAS/SARSAT laboratory and an independent laboratory. In view of these two levels of certification, we believe that a third review by the Commission would be redundant and only delay the approval of the equipment for use. Therefore, in order to minimize the burden to the public and eliminate unnecessary regulation we are requiring equipment notification rather than type acceptance of equipment.[17]

D. Registration

10. With regard to the issue of registration, we proposed to treat 406 MHz ELTs the same as we treat 406 MHz EPIRBs. We proposed to require manufacturers to program each 406 MHz ELT with a unique code and to provide

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[7] A manufacturer, MPR Teltech Ltd., recommends that the 406.025 MHz be authorized and that aircraft voluntarily carry 406 MHz ELTs in lieu of the mandatory 121.5 MHz ELT. While we agree with MPR Teltech Ltd., this is an issue to be decided by the Federal Aviation Administration.

[8] U.S. Coast Guard comments at 1.

[9] U.S. Coast Guard comments at 2.

[10] Air Force at 1.

[11] NOAA comments at 7.

[12] NASA at 2, NOAA at 2, Air Force at 1, Coast Guard at 2, and Coppin of MPR Teltech at 3.

[13] See international Radio Regulations, Appendix 8.

[14] NASA at 3, NOAA at 2 and 3.

[15] NASA at 3.

[16] Coast Guard at 2.

[17] Type acceptance and notification are procedures by which we issue equipment authorizations. *See* 47 C.F.R. § 2.901. For type acceptance, the applicant makes measurements and submits certain representations and test data that demonstrate compliance with technical standards. For notification, the applicant makes measurements and attests that the measurements demonstrate compliance with the technical standards. Test data are not submitted unless specifically requested by the Commission. For both type acceptance and notification, the Commission issues an identification number (FCC ID#).

each 406 MHz ELT a plate or label containing registration instructions requested by NOAA. Additionally, we proposed to require manufacturers to include with each marketed 406 MHz ELT a pre-addressed post card soliciting the aircraft owner's name, address, telephone number, identification code and aircraft type for registration in NOAA's database. We proposed, however, that registration be voluntary. The commenters support our proposals except for voluntary registration. They argue that registration should be mandatory. While we are adopting our proposed registration procedures, we note that there is a petition for rule making pending before the Commission (RM-8008)[18] requesting mandatory registration of EPIRBs. The decision on whether registration should be mandatory or voluntary should be the same for both ELTs and EPIRBs. Therefore, we will address the issue of mandatory registration of ELTs in a separate proceeding concerning RM-8008.

IV. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED that, pursuant to the authority contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r), Part 87 of the Commission's Rules IS AMENDED as set forth in the Appendix below, effective 30 days after publication in the Federal Register.

12. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

13. For further information, contact James Shaffer, Private Radio Bureau, Federal Communications Commission, 1919 M ST, NW, Washington, DC 20554; telephone 202-632-7197.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FINAL RULES

Part 87 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

Part 87 - AVIATION SERVICES

1. The authority citation for Part 87 continues to read as follows:

AUTHORITY: 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-156, 301-609.

2. In Section 87.133(a) the stability table is amended by adding a new entry at the end of paragraph (6) to read as follows:

§ 87.133 Frequency stability.

(a) * * *

Frequency band (lower limit exclusive, upper limit inclusive), and categories of stations.	Tolerance[1]	Tolerance[2]
* * * * *		
(6) Band -137 to 470 MHz:		
* * *		
Emergency locator transmitters on 406 MHz	N/A	5
* * * * *		

3. In Section 87.137(a) the emission table is amended by adding a new entry in alphabetical order to read as follows:

§ 87.137 Types of emission.

(a) * * *

Class of emission	Emission designator	Authorized bandwidth (kilohertz) Below 50 MHz	Above 50 MHz	Frequency deviation
* * * * *				
G1D	16K0G1D		20 kHz	
* * * * *				

4. In Section 87.139 paragraph (h) introductory text is revised to read as follows:

§ 87.139 Emission limitations.

* * * * *

(h) For ELTs operating on 121.500 MHz, 243.000 MHz and 406.025 MHz the mean power of any emission must be attenuated below the mean power of the transmitter (pY) as follows:

* * * * *

5. Section 87.145 is amended by adding a new paragraph (d)(4) to read as follows:

§ 87.145 Acceptability of transmitters for licensing.

* * * * *

(d)* * *

(4) ELTs notified in accordance with § 87.147(e).

* * * * *

6. Section 87.147 is amended by revising the section heading, revising the first sentence of paragraph (a), revising the first sentence of paragraph (b), revising paragraph (d) introductory text, and adding a new paragraph (e) to read as follows:

§ 87.147 Authorization of equipment.

[18] Petition filed on May 27, 1992, by the U.S. Coast Guard, Public Notice No. 1894.

(a) Type acceptance or notification may be requested by following the type acceptance or notification procedure in Part 2 of this Chapter. * * *

(b) ELTs that operate on the frequencies 121.500 MHz and 243.000 MHz that are manufactured after October 1, 1988, must meet the power output characteristics contained in paragraph 87.141(i) when tested in accordance with the Signal Enhancement Test contained in Subpart N, Part 2 of this Chapter. * * *

* * * * *

(d) An applicant for type acceptance of equipment intended for transmission in any of the frequency bands listed in paragraph (d)(3) of this section, must notify the FAA of the filing of a type acceptance application. The letter of notification must be mailed to: FAA, Spectrum Engineering Division, 800 Independence Avenue SW., Washington, DC 20591 no later than the date of filing of the application with the Commission.

* * * * *

(e) Application for notification of ELTs capable of operating on the frequency 406.025 MHz must include sufficient documentation to show that the ELT meets the requirements of § 87.199(a). A letter notifying the FAA of the filing of an application for a grant of notification must be mailed to: FAA, Spectrum Engineering Division, 800 Independence Avenue SW., Washington, DC 20591 no later than the date of filing of the application with the Commission.

7. In Section 87.173 the frequency table in paragraph (b) is amended by adding a new entry in numerical order to read as follows:

§ 87.173 Frequencies.

* * * * *

(b) * * *

Frequency or frequency band	Subpart	Class of station	Remarks
* * * * *			
406.025 MHz . .	F, G, H, I, J, K, M, O	MA, FAU, FAE, FAT, FAS, FAC, FAM, FAP	Emergency and distress

* * * * *

8. In section 87.187 existing paragraphs (m) through (bb) are redesignated (n) through (cc) and a new paragraph (m) is added to read as follows:

§ 87.187 Frequencies.

* * * * *

(m) The frequency 406.025 MHz is an emergency and distress frequency available for use by emergency locator transmitters. Use of this frequency must be limited to transmissions of distress and safety communications.

* * * * *

9. In Section 87.195 paragraph (a) is amended by adding a new last sentence to read as follows:

§ 87.195 Frequencies.

(a) * * * ELTs that transmit on the frequency 406.025 MHz use G1D emission.

* * * * *

10. A new Section 87.199 is added to Subpart F to read as follows:

§ 87.199 Special requirements for 406.025 MHz ELTs.

(a) Except for the spurious emission limits specified in § 87.139(h), 406.025 MHz ELTs must meet all the technical and performance standards contained in the Radio Technical Commission for Aeronautics document titled "Minimum Operational Performance Standards 406 MHz Emergency Locator Transmitters (ELT)" Document No. RTCA/DO-204 dated September 29, 1989. This RTCA document is incorporated by reference in accordance with 5 U.S.C. 552(a). The document is available for inspection at Commission headquarters in Washington, D.C. or may be obtained from the Department of Transportation, Federal Aviation Administration, Office of Airworthiness, 800 Independence Avenue SW, Washington, D.C. 20591.

(b) The 406.025 MHz ELT must contain as an integral part a homing beacon operating only on 121.500 MHz that meets all the requirements described in the RTCA Recommended Standards document described in paragraph (a) of this section. The 121.500 MHz homing beacon must have a continuous duty cycle that may be interrupted during the transmission of the 406.025 MHz signal only.

(c) Prior to submitting a notification application for a 406.025 MHz ELT, the ELT must be certified by a test facility recognized by one of the COSPAS/SARSAT Partners that the equipment satisfies the design characteristics associated with the COSPAS/SARSAT document COSPAS/SARSAT 406 MHz Distress Beacon Type Approval Standard (C/S T.007). Additionally, an independent test facility must certify that the ELT complies with the electrical and environmental standards associated with the RTCA Recommended Standards.

(d) The procedures for obtaining a grant of notification from the Commission are contained in Subpart J of Part 2 of this Chapter.

(e) An identification code, issued by the National Oceanic and Atmospheric Administration (NOAA), the United States Program Manager for the 406.025 MHz COSPAS/SARSAT satellite system, must be programmed in each ELT unit to establish a unique identification for each ELT station. With each marketable ELT unit the manufacturer or grantee must include a postage pre-paid registration card addressed to: NOAA/SARSAT Operations Division, E/SP3, Federal Building 4, Washington, D.C. 20233. The registration card must include the ELT identification code and must request the owner's name, address, telephone number and type of aircraft.

(f) In addition to the identification plate or label requirements contained in §§ 2.925, 2.926 and 2.979 of this chapter, each 406.025 MHz ELT must be provided on the outside with a clearly discernable permanent plate or label containing the following statement: "It is imperative that the owner of this 406.025 MHz ELT register the NOAA identification code contained on this label with the National Oceanic and Atmospheric Administration (NOAA) whose address is: NOAA, NOAA/SARSAT Operations Division, E/SP3, Federal Building 4, Washington, D.C. 20233."

(g) For 406.025 MHz ELTs whose identification code can be changed after manufacture, the identification code shown on the plate or label must be easily replaceable using commonly available tools.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

800 Data Base Access Tariffs

ORDER

Adopted: May 5, 1993; **Released: May 5, 1993**

By the Chief, Tariff Division, Common Carrier Bureau:

1. On April 28, 1993, the Common Carrier Bureau released an Order[1] which, among other things, partially suspended the basic 800 data base query rates of GTE Telephone Operating Companies (GTOC) and United Telephone Companies (United). The Order also required LECs which do not own their own SCP to file tariff revisions flowing through the effect of any reductions in the rates of GSTC, GTOC and United. The Order required that these revisions be filed by May 6, 1993. On April 30, 1993, GSTC and GTOC (collectively, Petitioners) filed an emergency motion for stay of the above-referenced Order with the United States Court of Appeals for the District of Columbia Circuit and the court temporarily stayed the effectiveness of the Order to permit further briefing on whether a stay, pending review on the merits, was warranted. On this same date, the Court granted an administrative stay of the Bureau's April 28 action.

2. The LECs who purchase query service from Petitioners and are subject to the requirements of paragraph 33 of the Bureau's April 28 Order need not file those tariff revisions if the Court grants the Petitioners' pending motion. In this event, those tariffs need not be modified because no rate changes will be necessary from the original tariff filing. Alternatively, if Petitioners' motion is denied, those LECs will have to comply with paragraph 33 of the Order, but may not be able to do so by May 6. Therefore, if Petitioner's motion is denied, LECs subject to paragraph 33 of the Bureau's April 28 Orders must comply within three business days after the day on which the Court denies Petitioner's motion.

3. Accordingly, IT IS ORDERED that an extension of time in which to file tariff revisions IS GRANTED, to the extent specified herein.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

[1] The Bell Operating Companies' Tariff for the 800 Service Management System, Tariff F.C.C. No. 1, (CC Docket 93-129), DA 93-491 (Com. Car. Bur. April 28, 1993) (Order).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: May 6, 1993

GUAM TELEPHONE AUTHORITY FILES COMPLIANCE PLAN

Pleading Cycle Established

COMMENTS: May 27, 1993
REPLY COMMENTS: June 10, 1993

On April 19, 1993, Guam Telephone Authority (GTA) submitted an "Integrated Compliance Plan and Reply" (Compliance Plan) responding to comments on its answer to the Commission's June 2, 1992 *Show Cause Order*.[1] Because the *Show Cause Order* did not provide for that pleading, GTA requests by separate motion that the Commission accept the additional pleading.

The *Show Cause Order* declared the exclusive jurisdiction of the Commission over interstate and foreign common carrier communications originating or terminating on Guam, and ordered GTA to show cause why it should not file interstate and foreign exchange access tariffs, or failing that, why the Commission should not prescribe such tariffs. GTA filed an Answer to the *Show Cause Order* and several parties commented on the Answer.

GTA asserts that its pleading is responsive to criticism and suggestions directed by commenters, and that its Compliance Plan will provide the framework for "the advent of a new competitive environment on Guam." GTA then explains the six different steps envisioned by its Compliance Plan.

Interested parties may file comments regarding GTA's Compliance Plan no later than **May 27, 1993**. Reply comments may be filed no later than **June 10, 1993**. (This Notice does not affect pleading cycles prescribed by the Rules, or other Bureau action that may be taken with respect to the interim tariff filed under GTA Transmittal No. 1 on April 19, 1993.)

An original and four copies of all comments and replies must be filed in accordance with Section 1.51(c) of the Commission's Rules, 47 C.F.R. § 1.51(c). In addition, one copy of each pleading must be filed with International Transcription Services (ITS), the Commission's duplicating contractor, at its office at 2100 M Street, N.W., Suite 140, Washington, D.C. 20037, and one copy with the Chief, Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

For further information, contact Stan Wiggins, Tariff Division, Common Carrier Bureau, (202) 632-6917.

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[1] IT&E Overseas, Inc. and PCI Communications, Inc. (Petition for Emergency Relief and Expedited Declaratory Ruling), 7 FCC Rcd 4023 (1992) (*Show Cause Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-150

In re Applications of

FRANK DIGESU, SR.	File No. BPH-880126ME
VIRGINIA GRIFFITH	File No. BPH-880127MN
LINDA L. ALT	File No. BPH-880128MO
KPI COMMUNICATIONS, INC.	File No. BPH-880128MW

For Construction Permit for
New FM Station, Channel 231A
Meridianville, Alabama

Appearances

Donald E. Martin, Esq. on behalf of Frank Digesu, Sr; *Andrew S. Kersting, Esq.* and *Harry Martin, Esq.* on behalf of Virginia Griffith; *Richard J. Bodorff, Esq.* and *Kenneth D. Ebanks, Esq.* on behalf of Linda L. Alt; *Kathy Franco, Esq.* on behalf of KPI Communications, Inc.; and *Gary Schonman, Esq.* on behalf of the Mass Media Bureau, Federal Communications Commission.

SUPPLEMENTAL INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOHN M. FRYSIAK

Issued: May 6, 1993; Released: May 13, 1993

PRELIMINARY STATEMENT

1. This proceeding is on remand from the Commission for further hearings. In response to a Petition to Enlarge the Issues, filed in this proceeding by Frank Digesu, Sr. ("Digesu") on April 8, 1992, the Commission remanded the proceeding to the Administrative Law Judge for the purpose of conducting a further hearing on the following issue which it added against Virginia Griffith ("Griffith"):

> To determine whether Virginia Griffith made misrepresentations or lacked candor before the Commission in describing her past broadcast experience and, in light of the evidence adduced under this issue, the effect thereof on her qualifications to be a Commission licensee.

Memorandum Opinion and Order, FCC 92-373, released August 25, 1992 (*MO&O,* FCC 92-373). The burden of proceeding was placed on Digesu, while Griffith was assigned the burden of proof.

2. Hearing sessions were conducted on November 9 and 10, and December 14, 15 and 16, 1992. The record was closed on December 16, 1992 (Tr. 1531; *Order* FCC 92M-1095, released December 21, 1992).

BACKGROUND

3. In its *MO&O,* FCC 92-373, the Commission delineated the scope of the remanded hearing. The relevant paragraphs of *MO&O* 92-373 (15 and 21) are cited herein to serve as reference points for the findings of fact.

> Digesu's contentions seek to establish that Griffith's characterization of her past broadcast experience constituted intentional deception. Digesu's contentions are on their face material since intentional deception, if proven, could result in Griffith's disqualification. We therefore examine the conflicting evidence proffered by the parties to determine whether any unresolved factual disputes leave a substantial question as to whether intentional deception took place.
>
> The first such factual dispute involves Digesu's allegation that during the period that Griffith claimed to be a full-time employee and office manager she was not actually an office manager -- or even a staff member or employee -- and that she had no decision-making authority. Petition, Att. 6 at 1 ¶ 2, Att. 7 at 1 ¶ 3, Att. 8 at 1 ¶ 2. In evaluating this dispute, we are faced with a situation in which Digesu's three declarants directly contradict the statements of Griffith and Buxton. We find that an examination at hearing of the credibility of the respective individuals is necessary to determine the accuracy of Griffith's claimed participation during this period.
>
> Although we also have documentary evidence bearing on the factual question, we find that this evidence is not sufficient on its face to resolve the questions raised by the opposing declarations. Specifically, the documentation indicates that Griffith was listed on the station's payroll during part of the relevant time period. Opposition Att. A, Exh. 1. These records do not reveal, however, the nature of Griffith's duties or even whether her status at the station was merely nominal. Moreover, the records cover only a portion of the time in question. As Digesu contends, the authenticity of the records has not been established, and Digesu proffers testimony by Lee indicating that no payroll records were made for Griffith at other times. See Reply. Att. 2 at 1 ¶ 2.
>
> Griffith also produced a contemporaneous letter signed by her as "office manager." Opposition Att. A, Exh. 2. This isolated letter, however, does not establish the nature or extent of Griffith's duties, only that she used the title "office manager" on one occasion. Griffith also produced contemporaneous correspondence indicating that Griffith was involved both in proceedings for the allotment of an FM channel to Huntsville and in defending a bank suit against WTAK. Opposition Att. A, Exh. 4, Att. C. Although this correspondence establishes that Griffith had a connection with the station, it does not establish that she was a regular employee or manager.
>
> The second factual dispute involves Digesu's allegations concerning Griffith's claimed tenure as full-time general manager. Digesu does not challenge the

accuracy of Griffith's claim that she served as WTAK's general manager. However, Digesu contends her designation as general manager was misleading because: (1) although Griffith had the title "general manager," she was not knowledgeable about or interested in station affairs; and (2) Griffith's participation was not full-time.

With respect to the former point, Griffith submitted documentation intended to demonstrate Griffith's active participation in a range of station affairs.[1] We find that this documentation is generally responsive to the allegation that she was neither knowledgeable about nor interested in station affairs, although it does not fully delineate the scope of her responsibilities.

However, with respect to the latter point, Griffith admits that she did not always conduct station business on station premises. Opposition, Att. A at 3 ¶ 6. (Griffith states that she spent 40 or more hours a week at WTAK only "immediately after I became general manager." *Id.* at 10 ¶ 18). Griffith seeks to account for this discrepancy by explaining that she worked on station business at home and at her husband's cancer treatment clinic (but not as marketing director). She thus claims that in that sense her participation was "full-time." However, such self-defined "full-time" employment does not correspond to the Commission's definition of "full-time for purposes of seeking quantitative integration credit and therefore tends to be misleading. An unsupported claim of "full-time" participation may under some circumstances constitute intentional deception, as we found to be the case in *Mid-Ohio Communications, Inc.*, 5 FCC Rcd 940 (1990), *recon. denied*, 5 FCC Rcd 4596 (1990).[2] Further inquiry is necessary to determine whether Griffith's claim of full-time participation was intentionally misleading and deceptive.

FINDINGS OF FACT

4. In her Integration and Diversification Statement filed in this proceeding on May 17, 1990, Griffith stated: "I plan to seek credit for . . . my broadcast experience as office manager (1984-86), general manager (1986-88) and C.E.O. (1988-present) of Station WTAK, Huntsville, Alabama; . . ." (Digesu Ex. 16). Griffith signed and dated her Integration and Diversification Statement on May 14, 1990 (Tr. 1424).

5. Griffith was deposed during the comparative phase of this proceeding on October 16, 1990. At that time regarding Griffith's employment at WTAK, she replied to opposing counsel that she was the WTAK office manager from 1984 to 1986 and that it was a full-time position (Digesu Ex. 17; Deposition pp. 6-8, 12-13).

6. In her original direct testimony offered and accepted into evidence in this proceeding as Griffith Exhibit 1 on December 10, 1990, Griffith testified:

> *Broadcast Experience.* My broadcast experience consists of working at Station WTAK(AM), Huntsville, Alabama in the following capacities: full-time Employee/Office Manager (1984-86), full-time General Manager (1986-1988) and part-time C.E.O. (1988-present).

7. Upon cross examination at the December, 1990 hearing session, Griffith reaffirmed that she had been employed at WTAK on a full-time basis -- at least 40 hours per week -- as the office manager and as the general manager (Tr. 40).

8. At the December, 1992 hearing, Griffith asserted that she was employed at WTAK on a full-time basis, at least 40 hours per week, from December, 1984 until early August, 1986; and again from January 1987 until December, 1988 (Griffith Ex. 8, pp. 2, 7, 9).

9. Three former general managers, a former program director and a former office manager of WTAK, each of whom were employed at WTAK during some portion of the time that Griffith claimed to be employed at the station offered testimony contradicting Griffith's claims.

10. *David Driscoll* ("Driscoll"). David Driscoll was the general manager of WTAK from sometime in 1983 through the end of December, 1984 (Digesu Ex. 2, p. 1). Mr. Driscoll states that during his tenure at WTAK, he never considered Griffith (then known as Virginia Morley) to be an employee of the station. He never conducted an employment interview with her, he never hired her, and he never assigned her any job to perform (*Id.*).

11. Driscoll testified that the station's owner, Parker Griffith, asked him in the summer of 1984 "to find something for Griffith to do whenever she came by the station." Driscoll suggested that maybe she would like "to fool around with the music files." Parker Griffith never asked Driscoll to be more specific than that (*Id.*, pp. 1-2).

12. Driscoll stated that Griffith came to the station for a few hours here and there, at her own convenience and without regard for the schedule of any person or the station's operational needs. She came and went as she pleased (*Id.*).

13. Driscoll did not assign Griffith any tasks which involved typing, filing, billing, assisting in bookkeeping or compiling public service announcements. To the best of his knowledge, she did not perform any such tasks while he was the general manager. According to Driscoll, Griffith spent her time at the station sitting at an otherwise vacant desk, talking on the telephone on calls apparently unrelated to station business, and greeting passers-by. Further, Driscoll did not assign Griffith any off-premises tasks and he does not recall that she performed tasks for the station off of the premises (*Id.*).

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[1] These include documents relating to (1) Associated Press service (Opposition Att. A, Exh. 12); (2) amounts owed BMI (Exh. 13); (3) payments for an engineering study (Exh. 14); (4) an insurance quotation (Exh. 15); (5) sales contracts (Exh. 16); (6) station repair work (Exh. 17); (7) telephone service (Exh. 18); (8) Compu-Weather service (Exh. 19); and (9) a van lease (Exh. 20).

[2] As noted above, Griffith also admits that she erred in her testimony as to the dates on which various events occurred. Further hearings should explore the significance, if any, of these lapses.

14. Driscoll states that the bookkeeper at WTAK collected the time sheets from all employees and prepared the paychecks for his signature. During his tenure as general manager, Driscoll never saw a time sheet or a paycheck for Virginia (Morley) Griffith (*Id.*, p. 3).

15. Driscoll does not recall any occasion when Griffith was at the station for a full 40-hour week, or for eight hours during any one day. During many weeks, he states that she did not make any appearance at WTAK at all. Driscoll estimates that on the average, she spent about 15 hours per week at WTAK during his tenure as general manager (*Id.*, pp. 3-4).

16. Driscoll earlier in the proceeding provided a statement in support of a petition to enlarge issues filed by KPI against Griffith (Tr. 1102-03). Driscoll's statement alleged, *inter alia*, that (i) he was responsible for finding the Meridianville frequency; and (ii) Griffith did not participate in the rulemaking aspect of the Meridianville proceeding and had no role in the allocation of the channel to Meridianville (*Id.*). However, Driscoll misstated his tenure at WTAK as being until December, 1985 (Tr. 1103). He left in December of 1984 and the rulemaking was not filed until after Driscoll had left the station (Griffith Ex. 8, Att. 15). In light of this mistake KPI's petition to enlarge was withdrawn (Tr. 1103).

17. Following KPI's withdrawal of the above-stated petition, Driscoll received a letter from Ronald F. Suber, Griffith's attorney, wherein he stated that he had been retained to obtain all relief possible for Driscoll's misstatement made in connection with the petition and offered to settle for the payment of legal fees in the amount of $2,640 or otherwise he would advise Griffith to sue for legal fees and other damages (Digesu Ex. 13, Tr. 1154-55). Driscoll regarded Suber's letter as an "intimidation letter" (Tr. 1155).

18. In response, Driscoll called Suber and told him that he was simply asked to state what he did "as far as spotting the FM frequency" and what he stated was different from what Griffith had said that she had done; that he did not call her a liar or intended to slander her (Tr. 1157). He testified that as a result of the Suber letter he now feels that he has to at least prove that he is telling the truth (*Id.*). Driscoll resented that the letter stated that he was fired at WTAK, which in fact he wasn't (*Id.*).

19. *Tom Percer* ("Percer"). Tom Percer was the general manager of WTAK from around the end of 1984 until April or May of 1985 (Digesu Ex. 3, p. 1). When Percer began working at WTAK, Driscoll introduced him to the station staff. Virginia Morley was not included in those introductions and Percer never knew her as an employee, and he never considered her to be a station employee (*Id.*, p. 2).

20. During the time of Percer's employment at WTAK, Virginia Morley had no assigned duties or work schedule. She came and went as she pleased with no apparent pattern. Her visits to the station were scattered and unpredictable. Percer estimated that on the average she spent approximately 20 hours per month at the station. She spent her time sitting at an empty desk, talking on the phone or with passers-by. She made no tangible contribution to the station's operation or business (*Id.*).

21. During Percer's tenure, Griffith did not report to Percer or to any one else on the station staff. Percer did not supervise her, nor did anyone else on the station staff. She did not supervise any station employee. Percer states she did not perform any tasks involving typing, filing, billing or compiling public service announcements. Percer never assigned any off-premises tasks to Griffith. To the best of his knowledge, she did not participate in any such tasks (*Id.*, pp. 2-3).

22. As the general manager of WTAK, Percer reported each employee's work time each pay period to Parker Griffith's bookkeeper, who then prepared the paychecks for the employees of WTAK. Percer then distributed the checks to the employees. Percer never reported any hours worked by Griffith nor did he ever deliver a paycheck to her (*Id.*) Upon being presented with Griffith's earnings record (Griffith Ex. 8, pp. 72-73) containing a list of her recorded hours, Percer testified that, to the best of his knowledge, the WTAK bookkeeper did not keep this type of earnings record for any station employee (Tr. 1061-62).

23. While Percer was still general manager, Nat Tate was hired but Percer stayed on for a time (Tr. 1069). Percer was told that Tate would be coming in as a prospective 25% owner of the station and would have authority as general manager (Tr. 1069). Percer was not deeply distressed at being replaced, but was somewhat disquieted because he had hoped that the job would be full time for an extended indefinite period of time (*Id.*).

24. *Nathan W. Tate, Sr.* ("Tate"). Tate became general manager of WTAK in April 1985 (Digesu Ex. 4, p. 1; Tr. 774). He is an Afro-American. Tate first began in radio in 1962 (Tr. 762). At that time, Tate was a disc jockey and also acted as a salesman in selling advertising for his program. He was paid on a commission basis and received 50% of what he sold. Tate later had a television show for which he sold time and received a 50% commission (Tr. 763). At the time he was hired there was no vacancy at the station (Tr. 581).

25. For some time prior to coming to WTAK, Tate worked as a security officer at TVA (Tr. 769-70). In 1984 he became president of the TVA security (employee) association (Tr. 766-70). This is equivalent to being a job steward for a labor union (Tr. 770). Tate would assist employees in job grievance procedures (Tr. 772). This would require him to be on occasion in different locations (Knoxville, Nashville, Mussel Shoals and Browns Ferry (Tr. 773-74)) three times a month, but some months the meetings would last more than one day once or twice every six months (Tr. 787-88).

26. Tate's first contact with Parker Griffith was by phone (Tr. 781). At the first meeting they negotiated (Tr. 782). An attorney Henry Mims was also present (*Id.*, see also Tr. 582). According to Tate, Parker Griffith knew that he was working at the TVA because in negotiating a salary they settled the compensation for Tate at $350 per week plus commission whereas the previous general manager was paid $750 per week (*Id.*). There were several job discussions (Tr. 784) and Griffith was present at those held after the initial meeting (Tr. 781). According to Tate, Parker Griffith never told Tate that his working at TVA was a problem (Tr. 789, 791). Parker Griffith did discuss getting other properties and wanted Tate to "come on board and devote all of (his) time (to) developing a network or chain of stations" (Tr. 791); "(w)e discussed future activities, future growth, and my being present for that future growth." (Tr. 792).

27. According to Parker Griffith, Tate did not disclose his TVA employment when he started working (Tr. 593). Parker Griffith stated that he learned of Tate's TVA employment gradually over a period of time; when he realized

that Tate was not available to talk with him (*Id.*). He stated that Tate did not disclose his outside employment until "probably a couple of months after he started." (Tr. 593).

28. While he was general manager Tate designed a rate effective January 1, 1986, and had it printed (Tr. 961-62). The second paragraph of the rate card stated that WTAK is owned by Gant Broadcasting Company, Inc., and the principal stockholders are Parker Griffith and Nat Tate (Griffith Ex. 30; Tr. 962). Tate alleges that in his negotiations with Parker Griffith, he agreed Tate would be given a part ownership interest in WTAK upon certain conditions (Tr. 960). Tate testified that Parker Griffith told him if he came in and met a profit schedule during his first year, he would get a 5% interest and be given an opportunity to buy "even more." (Tr. 960-61). Tate never received the 5% interest or any other interest in the station (Tr. 961). Tate claims he designed the rate card "after approval from Parker Griffith," and "went forth with no documents that Parker Griffith was not aware of." (Tr. 962-63). Tate testified that Parker Griffith approved the rate card "probably a couple of months prior to me getting it printed." (Tr. 963).

29. At the time Tate joined WTAK, he also had business interests. He was the sole owner of NTE Enterprises, Inc. ("NTE") a subchapter 5 corporation (Tr. 794, 797). NTE was used by Tate as a vehicle to sell advertising for other media (Tr. 794, 797, 802). Tate states that during the period when he was working at WTAK he had contracts in force that did not terminate because he began working at WTAK (Tr. 914). According to Tate the commissions payable during the time he worked for WTAK were earned on the long-term contracts that continued for one year (Tr. 803). He alleges that the contracts did not require any work (*Id.*). Parker Griffith contends that even if Tate's commissions were due on contracts entered into prior to his employment at WTAK, they, nevertheless, constituted "double dipping" because according to Parker Griffith when a one-year contract is sold, the salesperson still must service the contract by visiting the client and making periodic adjustments in the contract (Tr. 1305-06).

30. Tate was employed at WTAK from approximately April, 1985 until approximately February, 1987. He was the general manager during all of the time except for the last several weeks. During Tate's tenure as general manager, according to Tate, Griffith was never a full-time employee or a member of the WTAK staff. She did spend some time at the station. Tate did not consider her to be a station employee because he gave her no direction or assign any duties and she did not answer to him or anyone else on the station staff (Digesu Ex. 4, p. 1).

31. Tate testified that when he became the general manager, the previous manager, Tom Percer, introduced him to all of the station's employees. Percer did not identify Griffith as a station employee to Tate nor did he identify any station work she might be performing. Tate averred that at no time did he hire Griffith to be a station employee. He did not assign her to any work schedule (*Id.*).

32. Tate states that Griffith never worked a full-time 40-hour week at WTAK during the time that Tate was the general manager. She visited the station on her own whim with no apparent schedule or pattern. She was not the station's full-time office manager during Tate's tenure as general manager. Tate testified that if Griffith used that title, she adopted it without his authority (*Id.*, p. 2). He looked upon her as if she were the owner of the station (Tr. 843), as a representative of the owner (Tr. 846).

33. Tate testified that during his tenure, Griffith did not have oversight responsibilities for program logs, traffic, accounts payable and receivable or sales contracts. She did not have supervisory responsibilities for any WTAK employees. Tate does not recall every seeing a time sheet or other record of hours worked for Virginia Morley or Virginia Griffith during his tenure as general manager. Tate also does not recall seeing or knowing about the existence of any employee history file for Griffith (*Id.*).

34. *James P. Menefee, Jr.* ("Menefee"). Menefee was employed at WTAK from June, 1986 until January, 1989. He began as an announcer and was promoted to program director in early 1987. Tate left the station in early 1987 and Griffith assumed the title of general manager at that time (Digesu Ex. 5, p. 1).

35. Menefee testified that prior to the time when she became the general manager, Griffith held no title or position on the staff of WTAK. Prior to the time when she became general manager, Menefee had met Griffith on a couple of occasions. Each time she was introduced to him as the wife of Parker Griffith, the owner of Gant Broadcasting, the licensee of WTAK, and not as a WTAK employee or staff member. Griffith was not the office manager at any time while Menefee was employed at the station (*Id.*).

36. During the time that Menefee was employed at WTAK, Griffith never spent 40 hours in any one week working at the station or on station business. On the average, she spent about ten hours per week at the station. During many weeks, sometimes for three or four consecutive weeks, she never came to the station at all (*Id.*).

37. According to Menefee, during the time that Griffith was the general manager of WTAK, her constant and consistent absence from the station made it difficult to conduct normal business. The conduct of the station's business was frequently delayed because Griffith could not be located to make decisions. Even tasks such as signing paychecks were sometimes delayed because Griffith could not be found. Menefee sometimes found Griffith at her home. More often, she was located at her husband's medical office, the Huntsville Cancer Treatment Center ("HCTC") (*Id.*, p. 2).

38. In September, 1988, Menefee received a job offer from another radio station. He decided to accept that offer and wrote a resignation letter giving two weeks' notice of his intention to quit working at WTAK. He placed his letter on Griffith's desk at the station. The letter laid on Griffith's desk for ten days without any attention because Griffith never came to the station during that period of time. Menefee then took the letter to the HCTC and gave it to a receptionist because he felt certain Griffith would receive it there. Later that same day or the next day, Griffith came to WTAK and told Menefee that her husband, Parker Griffith, was willing to offer him a raise if he would stay at WTAK (*Id.*, p. 3).

39. *Gayle Lee* ("Lee"). Lee was employed at WTAK from June until December, 1986 and from May, 1987 until January, 1990 (Digesu Ex. 6, p. 1). Lee testified that during his first tenure at WTAK, Griffith was not the office manager. Griffith was not an employee of WTAK during that period, nor a member of the station's staff. She performed no duties or tasks, had no responsibilities and was not on the station payroll. She was rarely at the station. Lee occasionally saw her at the station with her husband, Parker Griffith. Lee almost never saw her there by herself (*Id.*, pp. 1-2).

40. One of Lee's duties was to prepare each employee's paycheck, calculating each employee's pay from the data on their time sheets. During Lee's first tenure at WTAK, he never saw a time sheet for Griffith and he never prepared a paycheck for her. Each employee at WTAK had an employee history file. Lee had access to all of the employee history files going back to 1984. He had to review and inspect each employee's file in the process of computerizing the station's records. In the course of performing that task, Lee never located or saw an employee history file for Griffith (*Id.)*.

41. Lee prepared the payroll tax withholding data for all WTAK employees for all of 1986. In early December, 1986, Lee personally delivered by hand all of the data for the first quarter of 1986 to the station's accounting firm so that they could begin preparing the employees W-2 forms for 1986. Lee later gave them the rest of the data for 1986. Lee did not provide any 1986 payroll information to the accountants for Virginia Morley or Virginia Griffith (*Id.*).

42. During Lee's second tenure at WTAK, Griffith held the title of general manager. Lee states that she was at the station no more than ten hours per week on the average. She was generally indifferent to the operations of WTAK. Because of Griffith's lack of attention, WTAK business was often delayed and disrupted. Griffith often was not available to sign checks, including paychecks, on a timely basis. Lee often had to search for Griffith and take the checks to be signed where ever he could find her. He often found her at the HCTC (*Id.*, p. 4).

43. *Virginia Griffith*. Griffith testified that after obtaining a divorce from Charles Morley in February, 1984, she was looking for something challenging to do (Griffith Ex. 8). She had been working in volunteer activities 40 hours per week for most 1984; but by August, 1984 her responsibilities in this regard diminished to the point where she could take or a part-time job (*Id.*). At the time she was dating Parker Griffith who encouraged her to apply for a job at his radio station WTAK (*Id.*).

44. She stated that she began working on August 13, 1984 (*Id.*). Attachment 1 to Griffith Exhibit 8 is a signed Alabama income tax withholding certificate dated August 13, 1984. Attachment 2 to Griffith Exhibit 8 is a station record of Griffith's earnings in 1984 showing that she worked a total of 188 hours from August 13, 1984 to December 4, 1984.

45. Griffith testified that she went full time in approximately December, 1984 (Griffith Ex. 8). The first few months she spent 20 hours per week on a station promotion which required her to be at a location removed from the station (*Id.*). In the first quarter of 1985 she was responsible for overseeing the station's Sunday morning health program for which she gathered information and statistics regarding current medical topics (*Id.*).

46. Griffith testified she spent additional time, as much as 20 hours per week, both on and off the station premises, on the Community Club Awards Program ("CCA"), going on sales calls, picking up the mail, running errands, taking deposits to the bank, and overseeing WTAK's Sunday morning health program (Griffith Ex. 25, pp. 4-5). Griffith did not record the time she spent on either the CCA or the health program because she undertook these projects voluntarily in order to learn more about the radio business and much of her work was done outside the station (Griffith Ex. 8, p. 6).

47. Griffith recalled David Driscoll asking her to come up with PSAs. Griffith reviewed letters from community organizations and used many of them to compile PSAs to be broadcast on WTAK. She alleged that she personally typed these announcements and gave them to the air staff. After completing her review of the correspondence Driscoll had given her, Griffith continued to process incoming correspondence from community groups in order to prepare PSAs. She estimated she prepared approximately 50 to 75 PSAs in this manner during the time Driscoll served as general manager (Griffith Ex. 25, p. 1). Griffith testified that at Driscoll's direction she also reorganized the music by putting numbered labels on each cart (*Id.*). Griffith stated that she also consulted the station's music reference books and placed orders with Nashville music companies to fill gaps in WTAK's library. Griffith testified that she spent at least several hours per week performing these functions throughout Driscoll's tenure as general manager (*Id.*).

48. Griffith testified that in May, 1985, she was promoted to the position of office manager (*Id.*). She stated that Parker Griffith wanted her in the position so that she would monitor the station's financial affairs (*Id.*). She stated that she worked as office manager on a full-time basis, at least 40 hours per week from May, 1985 to August 1, 1986 (*Id.*). Griffith has submitted her WTAK payroll records for the period January 1, 1985 to March 3, 1986 at Attachment 16 (*Id.*).

49. Attachment 16 to Griffith Exhibit 8 reflects that Griffith worked 48 hours in the first quarter of 1985; 94.5 hours in the second quarter; 195.5 hours in the third quarter of 1985. In the fourth quarter of 1985 Griffith was paid $200 per week but no indication is made as to the number of hours worked. The same is true for the first quarter of 1986.

50. Griffith stated that the payroll records do not reflect most of the hours she worked for the radio station in 1984-1986 (Griffith Ex. 8). She stated that due to her relationship with Parker Griffith her responsibilities at WTAK during 1984-1986 were broader than was reflected by the specific job titles that she had (*Id.*). According to Griffith, for Parker Griffith's sake she quickly came on to monitor station financial doings (*Id.*) She states that she recorded only the actual time she spent on duties which had been delegated to her by management personnel (*Id.*). She did not record the time she spent monitoring station management and finances, nor the time spent on a station promotion (para. 43, above) or the Sunday health program (*Id.*). According to Griffith, she also did not record all of the time worked in 1984 and 1985 because compensation from WTAK was never critical to her financial well being.

51. According to Griffith, she initially performed ministerial functions such as typing, filing, billing, assisting in the bookkeeping, cataloging music, and compiling public service announcements ("PSAs") (Griffith Ex. 8).

52. Griffith testified that during Percer's tenure she had no job title or specific duties. She continued to spend approximately 20 hours per week on the station premises compiling PSAs, typing, filing and assisting the bookkeeper, Vaishali Patel (Griffith Ex. 25, p. 4). Griffith also spent additional time at the station monitoring its daily financial condition for Parker Griffith (*Id.*).

53. Griffith produced WTAK's unemployment wage reports that reflect that she received paychecks during each quarter of 1985 and the first quarter of 1986 (Griffith Ex. 8, Att. 17). Griffith explained that she received only three

paychecks during the first quarter of 1985 because she stopped claiming a regular paycheck beginning in December 1984. She was aware of the station's financial condition and realized that her paycheck was coming directly from Parker Griffith's cash infusions (Griffith Ex. 25).

54. According to Griffith in approximately May, 1985, she was promoted to the position of office manager (Griffith Ex. 8, p. 2; Tr. 1426). She worked as office manager on a full-time basis, at least 40 hours per week, from May, 1985 until approximately August 1, 1986, when she hired Gayle Lee to replace her (Griffith Ex. 8, p. 3; Griffith Ex. 25).

55. She alleged that as office manager, she had oversight responsibility for program logs, traffic, accounts and receivable, and sales contracts (Griffith Ex. 8, p. 3). In addition, she made sale calls, supervised the bookkeepers, interviewed prospective employees, developed job descriptions for employees, signed station checks, and kept records of staff meetings (*Id.*). Griffith also was the station's political sales contact and dealt with WTAK's attorneys (*Id.*). Griffith does not believe her duties changed in any way when she officially became office manager, but remained the same (Tr. 1527).

56. Griffith did not have regular hours at WTAK from early August 1986 until she became general manager in January, 1987. Gayle Lee, who was hired in July, 1986 to computerize the station's payroll records, assumed the title of office manager (Griffith Ex. 8, p. 8; Tr. 1393, 1428). Griffith explained that she stopped receiving regular paychecks during the first quarter of 1985. She was aware of the station's financial problems and knew that anything she was being paid came directly from Parker Griffith's cash infusions (Griffith Ex. 25, p. 7).

57. Griffith testified that she did not fire Tate in December, 1986 when she took over as general manager (Griffith Ex. 8, p. 12; Tr. 1427). She explained that she was in need of a good salesperson (which Tate was) at that time, and it would not have made sense for her to fire him (Griffith Ex. 8, pp. 12-13). Tate initially agreed to Griffith's request to remain at WTAK as sales manager, but he later stopped showing up for work (*Id.* p. 13). Griffith testified during the entire time she served as general manager she continued to work full-time, 40 or more hours per week, on station affairs (Griffith Ex. 8, p. 9). She occupied the general manager's office at the station, but sometimes conducted business from the HCTC which her husband opened in 1987 (*Id.*). Griffith did not have her own office at the HCTC, but used spare offices or the conference room. Griffith explained that the HCTC is closer to her home and to downtown Huntsville than WTAK, and has better business facilities such as copiers and calculators (*Id.*).

58. Menefee began working at WTAK on August 16, 1986 (Griffith Ex. 8, p. 13). According to Griffith she and Menefee had disagreements regarding the manner the station should be run (Griffith Ex. 8, p. 13). Griffith was trying to cut costs and eliminate WTAK's substantial debt. Menefee wanted money to spend on promotions and programming (*Id.*).

59. Griffith recalled that Menefee tendered a resignation letter in September, 1988 (Griffith 25, p. 8). Although Menefee claims his resignation letter sat on Griffith's desk at WTAK for ten days without her coming to the station (Digesu Ex. 5, p. 3), Griffith stated that Menefee's resignation letter could not have remained on her desk for ten days before it came to her attention. Griffith explained that WTAK paid for Menefee to attend the NAB's radio convention held September 14-17, 1988, in Washington, D.C. (Griffith Ex. 25, p. 8, Att. 3). The station made arrangements for Menefee and other WTAK employees to attend the convention at least several weeks in advance. Griffith stated that Menefee would not have tendered a resignation letter in early September 1988 and let it sit on anyone's desk for ten days at a time when he was planning to travel to Washington, D.C., at WTAK's expense (Griffith Ex. 25, p. 8).

60. Griffith testified that Lee was never capable of performing his job (Griffith Ex. 8, p. 14). He had difficulty reconciling the financial information he kept in his computer with WTAK's checkbook. Griffith had difficulty ascertaining from Lee exactly how much cash the station had at any given time (*Id.*). Griffith testified that Lee's poor record-keeping made it difficult for her to work with him and she confronted him with his inadequacies from time-to-time (*Id.*).

61. Towards the end of Griffith's tenure as general manager, Lee accepted a position as mail carrier with the post office (Griffith Ex. 8, p. 14). He tried to fulfill his WTAK responsibilities on a three or four day-per-week schedule (*Id.*). Lee's absences required the staff to accommodate his schedule and further detracted from his efficiency. Lee was eventually dismissed by Buxton in 1990 because he could not explain a discrepancy of approximately $4400 between the amount of WTAK cash his computer records reflected and WTAK's bank records (*Id.*).

62. Parker Griffith testified that Griffith was working on station business a great deal of the time he was with her (Tr. 667). She became totally immersed in the station by the end of 1984 (Griffith Ex. 9). She not only worked in the office but also took on the responsibility of reviewing the station's business and financial status and reporting to him generally about what was going on (*Id.*).

63. According to Parker Griffith, Virginia worked full time as WTAK's general manager in 1987 and 1988. She supervised all aspects of the station's affairs for him. She handled all financial matters, conducted regular staff meetings, hired and fired employees and represented WTAK in the community. Sometimes she conducted WTAK business from the HCTC. Griffith had no other employment during 1987 and 1988. Parker Griffith hired Paul Buxton to be marketing director of HCTC in May, 1987 before the facility opened. Griffith "brainstormed" with Paul on promotions and otherwise helped break him in, but she never had any regular duties or title at HCTC. In response to a question of why he did not fire Tate, Parker Griffith explained that he never had anybody at WTAK that could sell as well as Tate (Tr. 594).

64. *Lory Butler* ("Butler"). Butler was employed at WTAK from March, 1984 until August, 1985. She worked part-time during the period from March to June 1984. Upon graduating from high school in June, 1984, Butler began working full-time and continued to do so until August 1985 (Griffith Ex. 13, p. 1; Tr. 998). Butler served as the station's receptionist, secretary, traffic manager, and assisted with billing throughout her employment at WTAK (Griffith Ex.13, p. 1; Tr. 1000). Butler testified that Griffith began working at WTAK on a part-time basis, approximately 15 hours per week, in the latter part of 1984 when Driscoll was the general manager (Griffith Ex. 13, p. 1; Tr. 1003). Shortly thereafter, and before the end of 1984, Griffith became a full-time employee of the station and continued to work on a full-time basis until Butler left the station

in August 1985. Butler was aware that Griffith received a paycheck (Griffith Ex. 13, p. 1; Tr. 1005). Butler could not remember Griffith's job title, but recalled that she was involved in billing, collections, bookkeeping, bill paying and assisted in traffic and sales. Butler showed Griffith how to prepare the station's checks (Griffith Ex. 13, p. 1: Tr. 1004). Butler testified that after Griffith began working full-time, she became more involved in bookkeeping, collections, traffic, and would go on sales calls with the sales staff (Tr. 1006). Butler specifically recalled Griffith working with the sales staff and questioning them, as well as logging expenses in a general ledger (Tr. 1004, 1007). Butler testified that she would see Griffith leave to go on sales calls, and would see her talking on the phone and asking advertisers why they had not paid their bills (Tr. 1007). Butler could not recall Griffith's specific work schedule, but believed she came in early in the morning and would leave the station around 5:00 p.m. (Tr. 1007).

65. Butler's initial employment at WTAK involved her participation in a high school work-study program (Tr. 997). Butler's mother was an employee of Parker Griffith in his medical practice (Tr. 998). Through that connection, Butler's mother knew of a job opening at WTAK and told Lory about it. Her mother spoke with Parker Griffith's assistant, Linda Tate, about the job (Tr. 999-1000). Butler's mother continued to be employed by Parker Griffith until September, 1992 (Tr. 1022).

66. *Diane Lavender* ("Lavender"). Lavender was an account executive at WTAK from October or November, 1983 until November or December, 1985 (Griffith Ex. 27).

67. Lavender testified that Griffith began working at WTAK on a part-time basis in the summer of 1984. Griffith was involved in the Community Club Awards program and "spent many hours each week" in that project. Toward the end of David Driscoll's tenure as general manager, Griffith began working full-time. Lavender cannot account for Griffith's specific hours because both Lavender and Griffith spent much of their time off the station's premises. However, Lavender testified that Griffith was present at the office most of the times when she came by the station, for two or three hours on a daily basis (Griffith Ex. 27, pp. 1-2). Upon cross-examination, Lavender said that in the last quarter of 1984 she did not see her as much as she did later (Tr. 1326) and didn't know all of the activities that she did (Tr. 1328). According to Lavender, Griffith didn't start coming to the station until late 1984 and did not have her own desk until mid-1985 (Tr. 1332). Lavender testified Griffith asked her to go out on sales calls (Tr. 1333), but Lavender did not know whether Griffith was going out with her because she wanted to learn sales or evaluate her (Tr. 1335). In regards to the CCA promotion, Lavender stated that for Griffith "it probably would take 13 hours a week It wasn't -- 15 or 20. It wasn't something that we talked about. And when I was in the field, you know, she could have been there." (Tr. 1346).

68. Lavender was treated by Parker Griffith for cancer from September, 1991 until August, 1992 (Tr. 1381).

69. Paul Buxton was the sales manager for WTAK from May, 1987 until January, 1989. From January, 1989 to the time of the November, 1992 hearing, he was the station's general manager (Griffith Ex. 10, p. 1). From May, 1987 until May or June, 1989, Buxton was also the director of marketing for the HCTC. In the beginning, Buxton was spending 40% of his time on HCTC business and the balance on WTAK business (*Id.*).

70. Buxton cannot account for all of Griffith's hours during the time she was general manager of WTAK (while he was the sales manager) because he was off the premises himself much of the time, either on HCTC business or selling for WTAK. He does believe however that "she was on the premises of WTAK on a daily basis." (*Id.* p. 3).

71. Buxton testified that he "was told by Griffith that [he] was going to have to make a statement in response to complaints that were filed against her application." (Tr. 719). Buxton has expressed an interest in working at Griffith's new FM station if her application is ultimately granted (Tr.745).

72. Buxton testified that the cancelled payroll checks for WTAK dating back to 1989 or 1988 are stored in a file cabinet in his office at the station. Additional cancelled checks dating back at least until 1986 are stored in another file cabinet at the station (Tr. 727-728).

73. Christian Thornton is an account executive and disc jockey at WTAK. He has been employed at the station since July, 1987. He testified that at the time he began working at WTAK, Griffith was the general manager and that she served in that capacity through the end of 1988. He recalls no time during her tenure as general manager that there was any delay in receiving his paycheck due to her absence from the station (Griffith Ex. 11, p. 1). Thornton offers no further testimony about Griffith's employment or activities at WTAK. Thornton's father was a former patient of Parker Griffith (Tr. 1185).

74. Donald Warren joined the staff of WTAK in the spring of 1985. Since that time, he has been a part-time salesman for the station and has been responsible for the presentation of WTAK's Sunday morning gospel programming. His duties require him to be present at the station for at least some time on three or four days each week (Griffith Ex. 12, p. 1).

75. Warren testified that during 1985 and 1986, Griffith was present in the station's business office a majority of the time when he came by the station during the week. He also testified that when Griffith became general manager in 1987, "she normally would be present at the station when [he] would come by." (*Id.*). However, Warren could not identify what position or title Griffith held with WTAK prior to becoming general manager (Tr. 1260).

76. According to Warren, the topic of Griffith's FM application was common knowledge among the staff of WTAK (Tr. 1241).

77. Warren produces a gospel music program which airs on WTAK on Sunday mornings. He began producing that program in April, 1985. In 1985, there was a health program scheduled in the middle of the Sunday morning gospel program. Since the time that Warren has been producing the gospel program, Griffith has not been involved in the health program (Tr. 1249-50). On redirect examination, Griffith's counsel asked Warren whether he would know if Griffith had been involved in the health program during the first quarter of 1985, prior to when he started working at WTAK in April. He replied that he would not have known (Tr. 1269).

CONCLUSIONS OF LAW

78. In assessing the record evidence, Griffith urges that her testimony be fully credited. It is stated that she never intended to withhold information from the Commission and that this is evidenced by her lack of motive to mis-

represent her broadcast experience. She argues that she is entitled to receive a comparative preference over all the competing applicants regardless of whether she claims to have served as office manager for one, two or three years. It is contended that a mere showing of full-time experience in 1985 and 1986 would be sufficient to win a comparative preference for broadcast experience. She argues that, moreover, the testimony of each of her witnesses should be fully credited because there is no evidence that they were influenced to give false accounts.

79. Additionally, Griffith argues that, on the other hand, the testimony of each of Digesu's witnesses should be discounted because their respective written direct testimonies contained nearly identical language evidencing collusion on their part sparked by their individual desires to retaliate for having lost their jobs at WTAK.

80. The record, however, discloses that Griffith was doubly motivated to be less than forthright about her broadcast experience. One of the main contentions in the case was that Griffith was a mere front for her husband, Parker Griffith, who is the owner of the Gant Broadcasting, Inc., the licensee of Station WTAK(AM), Huntsville, Alabama. From the very beginning Griffith had reason to anticipate that this contention would be raised because it was Gant Broadcasting that originally applied to have Channel 231A allotted to Meridianville, Alabama. Additionally, both she and her husband were co-applicants for the transfer of the license of Station WKQD-FM, Tellahoma, Tennessee, to a company they controlled, Camellia Broadcasting, Inc. Finally, her husband is the owner of the property to be used by Griffith for her site and he also is to provide his personal guarantee for Griffith's bank loan. The contention raised by the competing applicants was resolved in Griffith's favor thanks in part measure to the credit Griffith received for her alleged broadcast experience which was presented to demonstrate her serious commitment to broadcasting as well as to gain a comparative credit.

81. Moreover, Griffith is wrong in her contention that here was no reason to overstate her broadcast experience in light of the paucity of experience on the part of her competing applicants. In May of 1990, when she first claimed credit for broadcast experience, Griffith did not know what the extent of the broadcast experience of her competing applicants would be. To maximize her entitlement to comparative credit she couched her claim in misleading terms.

82. At the remanded hearing, Griffith altered her previous representations regarding her broadcast experience stating that the misrepresentations in her May, 1990 Integration Statement, in her deposition testimony, in her written direct testimony and cross-examination testimony were due to faulty recollections of dates and events in the mid-1980's and that she did not intend to take credit for work she did not do. But this statement cannot be accepted at face value. She fully realized that one may not make representations to the Commission using "within ball park figures." She herself took legal action when former general manager Driscoll unwittingly made a false disclosure about her. Griffith's statements have to be viewed as self-serving. It is deemed that her representations were calculated and intentionally made to gain more comparative credit for broadcast experience than she merits and to meet the serious issue of control.

83. In support of her claim that she had no intention to deceive the Commission and that her claim of full-time work as office manager and general manager is bona fide, Griffith also has presented some documentary evidence. However, the documentary evidence submitted is deemed to be inconclusive. The legitimacy of the payroll records remains contested and has not been satisfactorily resolved. Although the documentary evidence establishes Griffith's connection with WTAK, the documents do not establish the extent of her duties or terms of work or resolve the question of whether she was a radio station employee. None of Digesu's witnesses deny that Griffith was connected with WTAK. They challenge that she was a bona fide employee prior to becoming a general manager and they challenge the number of hours that she claims to have put in at the station. The record clearly indicates that they did not view or treat her as an employee, but rather as one who was there in behalf of the absent owner and who came to the station for short but irregular intervals. The documentary evidence submitted does not disprove their allegations. Viewed as a whole, the 45 attachments to Griffith Exhibit 8 and the four attachments to Griffith Exhibit 25 do not establish Griffith's claim of full-time attendance and work as a regular employee and office manager of the WTAK. Griffith herself allows that there are gaps in the records that were produced but she claims that it is because she didn't put down the hours when she was learning the radio business or the hours when she was doing station work away from the office. She stated that other records have been destroyed. The documentary evidence simply does not establish her claim of full-time day-to-day participation as a regular or management level employee.

84. A number of witnesses have testified in Griffith's behalf. They are represented as being free of any restraints to tell the truth. The record shows, however, that they each have reason to be less than objective. The record indicates that they either had strong personal ties to Parker Griffith or hope to work for Griffith in the new station. However, even if all of their testimony were fully credited, it still would not nail down the question whether Griffith participated on a full-time basis and whether Griffith was employed as an employee office manager on a day-to-day basis.

85. Lory Butler worked full time from June, 1984 until August, 1985. She thinks Griffith worked full time. She recalls her working until 5 p.m., but believed she came in early in the mornings. However, Butler doesn't remember whether Griffith had a title even though Butler worked as a receptionist, secretary, traffic manager and billing clerk.

86. Diane Lavender worked from October, 1983 to December, 1985. Lavender frankly admitted that she couldn't account for Griffith's specific hours of work. In her direct testimony she did not mention that Griffith was employed as office manager.

87. Paul Buxton, too, could not speak to the number of hours Griffith worked while she was general manager.

88. Christian Thornton, too, offered no significant testimony except to say that when Griffith was general manager he recalls no delays in receiving his paycheck due to Griffith's absence from the station. The testimony is vague and inconclusive.

89. Donald Warren's work at the radio station required him to be some time at the station three or four days a week. According to him, Griffith would normally be there when he came by. He did not know the specific position that Griffith held prior to becoming general manager.

90. Parker Griffith testified that he could not speak to how much time Griffith spent at the station, but he could say that Griffith worked at station business at home and at his cancer facility. He claims that she did no work for the HCTC.

91. Digesu witnesses all worked full time, were present day time hours, five days a week and were in a position to observe Griffith's attendance and work production. Three were general managers, one a program director and the last an account-office manager. Each presents testimony damaging to Griffith on the issues specified against her. Griffith maintains they lied.

92. General manager Driscoll's term covered 1984. He testified that although Griffith (then Griffith Morley) would visit the office perhaps about 15 hours per week he did not consider her an employee. He never hired her; didn't assign her duties; never saw a time sheet or a paycheck for her and states that Griffith was not accountable to him. Griffith claims that Driscoll is lying because she threatened to sue him if he did not pay money damages on account of a misstatement he made about her to the Commission. But this is a specious charge since there was no merit to the threatened law suit. Driscoll quite obviously mistakenly thought that the rulemaking matter was concluded before he left WTAK. Driscoll parted from WTAK on amicable terms. There is no evidence that he lied or that he had a reason to lie.

93. General manager Percer's term covered the first part of 1985. He too did not consider Griffith an employee. He recalled that she spent little time at the station and that she made no tangible contribution to the station's operation. Percer was replaced by Nat Tate, but only because Parker Griffith thought that the financial status of the station required a drastic change. Percer stayed on for a while until Tate took over. This belies any animosity he harbored toward the Griffiths. At the hearing Percer appeared to be an amiable courteous and well-mannered elderly gentleman. It's absurd to maintain that he holds a grudge to the extent that he would perjure himself.

94. General manager Tate's term covered from May, 1985 to early 1987. Tate never considered Griffith a WTAK employee. He understood her to be the owner's wife coming to the station looking after her husband's interest. He did not hire her; did not assign her any work and never supervised her. He stated that if she used the title of office manager it was without authority from him. Tate was a top notch salesman for WTAK. When he was being replaced as general manager he was asked to stay as sales manager. Parker Griffith believed he had to make changes at the station as a conservation measure thanks to the dismal financial picture. Presently, however, Tate is viewed by the Griffiths as a deceitful man. It is charged he did not tell Parker Griffith that he worked for TVA when he was hired for WTAK, that he passed himself as part owner on a rate card and that he was benefitting from a side business at the expense of WTAK. These alleged complaints are offered as a reflection on Tate's credibility. But they are of no consequence. People at the station knew from the start of his employment that Tate was a TVA man. He told Parker Griffith at the start the moneys paid on account of his "side business" after he came to WTAK were returns on earnings made prior to employment. Tate also maintains that Parker Griffith okayed the rate card that listed Tate as a part owner. Considering that Parker Griffith told Percer that Tate was coming in as a part owner, Tate's assertion is credible. At hearing Tate made a good impression. He testified in a straightforward manner. His demeanor belied that he held any animosity towards either of the Griffiths.

95. Menefee's tenure covered a period from June, 1986 to January, 1989. He was a program director. He, too, states that Griffith never worked full time; that she was there for short periods of time and even absent for weeks at a time. Menefee had no reason to lie. In fact, the record discloses that Menefee remained on friendly terms to the Griffiths after he left the station. The claim that Menefee lied about her because she wouldn't okay all of his requests for promotional advertising is tenuous at best.

96. Lee worked two stints, the last half of 1986 and from May, 1987 to 1990. He states that Griffith in 1986 was not a member of the staff and that during her term as general manager she put in no more than 10 hours a week. Lee computerized the station's records. He never located or saw an employee history file for Griffith. He prepared payroll tax withholding data the WTAK employees, but did not provide any 1986 payroll information to the accountants for Griffith. Lee states that Griffith's absence from the station and her lack of attention disrupted business. Griffith alleges that Lee is lying because he was dismissed. Lee is not a liar. His demeanor was observed and his testimony is deemed trustworthy. He was released from work at WTAK but not because of any lack of character.

97. Finally, Griffith charges that Digesu's witnesses must be lying because their testimonies use nearly identical words. But this is not a valid objection. These witnesses did not spin some intricate web. Each had a simple story to relate. Their testimonies may sound repetitious, but they do not smack of collusion. None of their testimony was shaken on cross-examination. Further, it is noted that Griffith's witness Lavender adopted as her own testimony that which was formulated by Griffith's counsel.

ULTIMATE CONCLUSIONS

98. In sum, Griffith has failed to meet her burden of proving that she did not intentionally mislead the Commission by claiming full-time participation as a regular employee, office manager and general manager of WTAK and by claiming employment as an employee-office manager of WTAK. Her self-serving declarations made in the attempt to answer the designated issues are not adequately supported by the documentary evidence in the record. Nor are they supported by the testimonies of the witnesses who appeared in her behalf. On the other hand, the testimonies of Digesu's witnesses are deemed credible and trustworthy. It is concluded that Griffith intentionally misled the Commission when she alleged employment as an employee-office manager and when she alleged full-time participation in 1984, 1985, 1986 and during her term as general manager. In light of this it must be ruled that the designated issues herein ARE RESOLVED against Griffith and that Virginia Griffith is unqualified to be a Commission licensee.

99. In the Initial Decision (FCC 91D-41), released August 5, 1991, it was determined that Frank Digesu, Sr. (File No. BPH-880126ME) was the runner up. In as much as Griffith is eliminated Frank Digesu, Sr. now is the winner.

Accordingly, IT IS ORDERED that unless an appeal from this Supplemental Decision is taken by a party, or the Commission reviews the decision on its own motion in accordance with Section 1.276 of the Rules, the application of Frank Digesu, Sr. (File No. BPH-880126ME) IS

GRANTED, and the applications of Virginia Griffith (File No. BPH-880127MN), Linda L. Alt (File No. BPH-880128MO) and KPI Communications, Inc. (File No. BPH-880128MW) ARE DENIED.[3]

FEDERAL COMMUNICATIONS COMMISSION

John M. Frysiak
Administrative Law Judge

[3] In the event exceptions are not filed within 30 days after the release of this Initial Decision and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Rule 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T COMMUNICATIONS,
Complainant,

v. File No. E-89-297

MCI TELECOMMUNICATIONS
CORPORATION,
Defendant.

MEMORANDUM OPINION AND ORDER

Adopted: May 3, 1993; Released: May 4, 1993

By the Commission:

1. The above-captioned complaint by AT&T Communications (AT&T) alleged that, during the two years prior to August 7, 1989, MCI Telecommunications Corporation (MCI) violated section 203 of the Communications Act by not filing tariffs for certain of its interstate telecommunications services. In January, 1992, the Commission denied in part and dismissed in part AT&T's complaint.[1] In so doing, the Commission held that MCI had acted consistently with the Commission's "forbearance" rules, which relieved nondominant carriers from the tariff-filing requirements of section 203 of the Communications Act.[2]

2. On November 19, 1992, in response to a petition for review by AT&T, the United States Court of Appeals for the District of Columbia Circuit reversed and remanded the case to the Commission to consider AT&T's claim for relief.[3] Specifically, the court stated:

> It would appear that AT&T is entitled promptly to a cease and desist order against MCI. We do not direct the Commission to provide specific relief, however, partly out of a reluctance to direct an agency as to the exact remedy to be employed and partly because of our expectation that the practices sanctioned by the *Fourth Report* will cease since carriers who do not file tariffs will be subject to damage suits in our district court. The Commission will also have to reconsider AT&T's damages claim. If the Commission continues to believe that retroactivity is an obstacle to recovery of damages, it must explain what it understands to be the applicable law and why that law constitutes a change that implicates retroactivity concerns.[4]

On January 21, 1993, the court denied the Commission's request for rehearing *en banc*. The Commission then promptly (on January 27, 1993) issued a public notice stating that, upon issuance of the court's mandate, "previously forborne nondominant carriers must file tariffs pursuant to section 203," and reiterated this statement on two subsequent occasions.[5] On January 28, 1993, MCI filed a new tariff.[6] The court issued its mandate on March 9, 1993.

3. In its original complaint, AT&T sought injunctive relief, damages and the imposition of forfeitures. On February 10, 1993, it filed a Motion for Cease and Desist Order, arguing that it is entitled to such an order under the court's decision and alleging that MCI is continuing to violate section 203. MCI opposed the motion, arguing that a cease and desist order is unnecessary because MCI is already in compliance with applicable tariffing requirements and that there is no basis to conclude that there is a reasonable expectation that it will violate such requirements in the future. In addition, on February 22, 1993, MCI filed a Petition for Declaratory Ruling in which it asked the Commission to declare that MCI is not liable for damages for conduct conforming to the Commission's forbearance rules. In a letter dated March 8, 1993, the Deputy Chief (Operations) of the Common Carrier Bureau Enforcement Division indicated that MCI's petition would be considered in this proceeding and that a pleading schedule would be established in the near future.

4. We now address the matters pending before us on remand. We find that, by providing interstate common carrier services not covered by a tariff on file with the Commission during the 1987-1989 period covered by AT&T's complaint, MCI violated section 203 of the Communications Act, as interpreted by the court in *AT&T v. FCC*. In accordance with the court's ruling, we order MCI, to the extent it has not already done so, to file tariffs including the information required by section 203 for all of its interstate common carrier services.[7] With respect to AT&T's request for damages (and forfeitures), we believe

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[1] 7 FCC Rcd 807 (1992).

[2] 47 U.S.C. § 203.

[3] *AT&T Co. v. FCC*, 978 F.2d 727, 729 (D.C. Cir. 1992), *rehearing en banc denied*, January 21, 1993. In light of the court's decision, the Commission stayed its contemporaneous rulemaking decision reaffirming the lawfulness of forbearance. *See Tariff Filing Requirements of Interstate Common Carriers*, 7 FCC Rcd 8072 (1992), *petition for review pending sub nom. AT&T v. FCC*, D.C. Cir. No. 92-1666 (filed December 29, 1992).

[4] *Id.* at 737.

[5] *Public Notice, Tariff Filing Requirements for Nondominant Carriers*, 8 FCC Rcd 744 (1993). *Accord Tariff Filing Requirements for Nondominant Carriers* (Notice of Proposed Rulemaking), 8 FCC Rcd 1395 (1993); *Public Notice, Commission Grants Interim, Blanket Rule Waiver to Permit Certain Nondominant Common Carriers to File Tariffs on Less Than 14 Days Notice*, FCC 93-71, released February 2, 1993. The Public Notices indicated that the Commission would not enforce certain technical requirements regarding the form of tariffs and granted a short-term waiver of the 14-day notice requirement in the Commission's Rules. They did not suggest that the Commission would not insist on compliance with all pertinent requirements of section 203.

[6] *See* MCI Transmittal No. 697, Tariff FCC No. 1, filed Jan. 28, 1993.

[7] We note in this regard AT&T's general allegations in support of its request for a cease and desist order that, in light of language in MCI's January 28, 1993 tariff, MCI continues to violate section 203. The record before us is not sufficient to resolve these allegations. To the extent AT&T has evidence about specific MCI services not provided pursuant to the requirements of section 203, it should provide that evidence in the context of a more particularized, separate complaint. *See* 47 U.S.C. § 208.

the appropriate next step is to seek comments on MCI's Petition for Declaratory Ruling. Accordingly, AT&T may file a response to that petition on or before May 21, 1993, and MCI may reply on or before June 1, 1993.[8]

5. Accordingly, IT IS ORDERED THAT AT&T's Complaint and its Motion for Cease and Desist Order ARE GRANTED to the extent set forth herein.

6. IT IS FURTHER ORDERED THAT AT&T's Motion for Expedited Consideration, filed February 10, 1993, IS GRANTED to the extent set forth herein.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[8] Others wishing to comment on MCI's petition in this complaint proceeding (E-89-297) may do so by filing *amicus* briefs on or before May 21, 1993.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Authorization of

Cable TV Services, Inc. File No. 2506-CM-P-83

For Multichannel Multipoint
Distribution Service station WHT578
on the F-group channels at
Deadhorse, Alaska

ORDER ON RECONSIDERATION

Adopted: May 5, 1993; Released: May 14, 1993

By the Chief, Domestic Facilities Division:

1. *Introduction.* After the cancellation by the Domestic Facilities Division (Division) on delegated authority of its authorization to construct and operate Multichannel Multipoint Distribution Service (MMDS) station WHT578 on the F-group channels at Deadhorse, Alaska, Cable TV Services, Inc. (Cable) requested reinstatement of its authorization.

2. *Background.* Although acknowledging that it had failed to complete construction by the deadline, Cable states, on reconsideration, that its authorization should be reinstated because it lost its financing and was unable to obtain substitute financing prior to the expiration of its construction period. Approximately six weeks after the construction expiration date, Cable filed an extension application. Cable justifies the late filing of its extension application because it was still searching for financing and it had orally advised Commission staff of its financing problems. Cable also argues that its authorization should be reinstated because, with the exception of video programming currently provided by satellite, no one but Cable would provide multichannel video programming to the residents of Deadhorse.

3. *Discussion.* Section 319(b) of the Communications Act of 1934, as amended, "provides that a construction authorization will be automatically forfeited if the station is not ready for operation within the time specified in the construction authorization, or such further time as the Commission may allow, unless prevented by causes not under the control of the grantee." *Miami MDS Co. and Boston MDS Co.*, 7 FCC Rcd 4347, 4348 (1992). The expiration date of Cable's construction authorization appeared on the face of the authorization. The authorization also contained the following express provision: "This permit shall be automatically forfeited if the facilities authorized herein are not ready for operation within the term of this permit...." At the time, this automatic forfeiture provision was specifically embodied in Section 21.44 of the Commission's Rules.[1] *Vidcom Marketing, Inc.*, 6 FCC Rcd 1945, 1946 n.3 (Dom. Fac. Div. 1991). "Carriers who fail promptly to construct facilities preclude other applicants who are willing, ready, and able to construct from access to limited and valuable spectrum. This has the effect of delaying, or even denying, service to the public. *Revision of Part 21 of the Commission's Rules*, 2 FCC Rcd 5713 (1987)." *Miami MDS Co. and Boston MDS Co.*, 7 FCC Rcd 4347, 4349 (1992). Cable's loss of financing and failure to obtain new financing did not toll its construction deadline. Cable's construction authorization was automatically forfeited pursuant to Section 319 of the Communication's Act, 47 C.F.R. Sec. 21.44 and the terms of the authorization. Cable's lack of financing fails to justify reinstatement of its authorization. Cable asserted in its initial application that it was financially qualified under 47 C.F.R. Sec. 21.17. Thus, it is the applicant's independent business judgment that it is financially qualified. Therefore, an independent business judgment to delay construction for financial reasons would not be a cause beyond the applicant's control, justifying an extension of time to construct an MMDS station. *See W. Lee Simmons, Inc.*, 2 FCC Rcd 4290 (1987) (extension applicant's business decision not to construct was within its own control); *Joe L. Smith, Jr., Inc.*, 5 Rad Reg. 2d 582 (1965); *accord Radio Longview, Inc.*, 19 FCC 2d 966, 968-71 (1969); *Beta Television Corp.*, 27 FCC 2d 761, 763 (Rev. Bd. 1970). Cable was required to file its extension application prior to the expiration of its construction authorization. 47 C.F.R. Secs. 21.11 and 21.44(a). Cable failed to do so. Therefore, its extension application is hereby dismissed as untimely filed.

4. *Conclusion and Ordering Clause.* Having carefully considered all of the arguments and evidence presented, we find that Cable TV Services, Inc. automatically forfeited its construction authorization for failure to construct prior to the specified expiration date, reinstatement of the authorization is not justified, and its extension application was late filed. Accordingly, IT IS ORDERED that the request for reinstatement filed by Cable TV Services, Inc. regarding the above-referenced MMDS authorization IS DENIED and its extension application IS DISMISSED. This order is issued pursuant to 47 C.F.R. Sec. 0.291, and is effective on its release date. *See* 47 C.F.R. Secs. 1.4(b), 1.106, and 1.115.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

[1] Section 21.44(a) stated *inter alia* as follows: "A construction permit shall be automatically forfeited if the station is not ready for operation within the term of the construction permit...."

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

CHRISTIAN RADIO
COMMUNICATIONS, INC.
Assignor

and File No. BAL-920422EF

WALKER BROADCASTING, INC.
Assignee

For Assignment of License of
WWKO(AM), Cocoa, Florida

MEMORANDUM OPINION AND ORDER

Adopted: May 5, 1993; Released: May 14, 1993

By the Commission:

1. On October 26, 1992, the Chief, Audio Services Division, Mass Media Bureau, acting pursuant to authority delegated by Section 0.283 of the Commission's Rules, denied a "petition to deny" filed October 7, 1992 by Hadden & Assoc. ("Hadden"), a media broker, against the above-captioned application for assignment of license.[1] The Commission has before it now an application for review filed by Hadden.[2]

2. We have reviewed the Bureau's disposition of the petition and find that the Bureau's ruling was correct and that no basis exists to warrant reversal.[3] Accordingly, IT IS ORDERED THAT, pursuant to Section 1.115(g) of the Commission's Rules, the application for review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[1] The Bureau dismissed Hadden's petition because it was untimely filed.

[2] Hadden's letter requested "an appeal to the full board, Federal Communications Commission." We have construed this as an application for review under 47 C.F.R. Sec. 1.115(a), which provides, in part, that "[a]ny person aggrieved by any action taken pursuant to delegated authority may file an application requesting review of that action by the Commission."

[3] Hadden's application for review does not dispute the procedural grounds upon which the Bureau disposed of its petition as untimely. Further, on the merits, the matters raised by Hadden relate to a dispute concerning a private contractual matter. The Commission has consistently held that it is not the proper forum for the resolution of such disputes. *See Banks Broadcasting Co., Inc.*, 60 R.R. 2d 1454 (1986); *John F. Runner*, 36 R.R. 2d 773, 776 (1976); *Sonderling Broadcasting Co.*, 46 R.R. 2d 889, 894 (1979). *See also Transcontinent Television Corp.*, 21 R.R. 945, 956 (1961).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

CHRISTIAN RADIO
COMMUNICATIONS, INC.
Assignor

and File No. BAL-920421EA

WALKER HEART OF FLORIDA
BROADCASTING, INC.
Assignee

For Assignment of License of
WHOF(AM), Wildwood, Florida

MEMORANDUM OPINION AND ORDER

Adopted: May 5, 1993; Released: May 14, 1993

By the Commission:

1. On November 4, 1992, the Chief, Audio Services Division, Mass Media Bureau, acting pursuant to authority delegated by Section 0.283 of the Commission's Rules, denied a petition to deny filed October 16, 1992 by Hadden & Assoc. ("Hadden"), a media broker, against the above-captioned application for assignment of license.[1] The Commission has before it now an application for review filed by Hadden.[2]

2. The application for review restates arguments made in the petition to deny. We have reviewed the Bureau's disposition of the petition to deny and find that the Bureau's ruling was correct and that no basis exists to warrant reversal. Accordingly, IT IS ORDERED THAT, pursuant to Section 1.115(g) of the Commission's Rules, the application for review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[1] Since the allegations in Hadden's petition to deny were not supported by affidavits of persons with personal knowledge of the supporting facts, *see* 47 U.S.C. Sec. 309(d), the Bureau treated the petition as an informal objection pursuant to 47 C.F.R. Sec. 73.3587. Hadden claimed that the assignor and assignee had not paid monies allegedly owed by them to Hadden.

[2] Hadden's letter requested "an appeal to the full board, Federal Communications Commission." We have construed this as an application for review under 47 C.F.R. Sec. 1.115(a), which provides, in part, that "[a]ny person aggrieved by any action taken pursuant to delegated authority may file an application requesting review of that action by the Commission."

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

SWEENY INDEPENDENT SCHOOL DISTRICT
Chalmers, TX — File No. BPLIF-910613DB

COLUMBIA-BRAZORIA INDEPENDENT SCHOOL DISTRICT
Brazoria, TX — File No. BPLIF-911008EO

TEXAS STATE TECHNICAL COLLEGE
Wharton, TX — File No. BPLIF-911009DC

For Construction Permit and License in the Instructional Television Fixed Service on Channels A1, A2, A3, A4

MEMORANDUM OPINION AND ORDER

Adopted: May 5, 1993; Released: May 14, 1993

By the Commission:

1. The Commission has before it for consideration the mutually exclusive applications of Sweeny Independent School District (Sweeny), Columbia-Brazoria Independent School District (Columbia-Brazoria), and Texas State Technical College at Waco (Texas State Technical), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on channels A1-A4 in the Chalmers, Texas area.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of Sweeny, Columbia-Brazoria and Texas State Technical. Sweeny and Columbia-Brazoria, both governmental organizations engaged in the formal education of enrolled students and accredited by the Texas Education Agency, are qualified ITFS applicants. Both propose to serve students within their own jurisdictions, and are, therefore, local applicants.

3. Texas State Technical also is qualified to be an ITFS licensee. It is one of four campuses of the Texas State Technical College System, a two-year accredited institution of higher education, created by the Texas Legislature and offering courses in vocational-technical education. Texas State Technical proposes to serve its own enrolled students at various locations in the Wharton area in addition to serving local junior and senior high schools with programming for credit toward high school degrees.[1] Accordingly, Texas State Technical is a qualified local ITFS applicant.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

4. In cases of mutually exclusive ITFS applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of 12 merit points based on five criteria deemed to be most relevant to selecting the applicant best qualified to provide the service for which the ITFS spectrum has been established. *Instructional Television Fixed Service - Second Report and Order in MM Docket 83-523 (Second Report and Order)*, 101 F.C.C. 2d 49, 65-72 (1985); 47 C.F.R. §74.913. First, four points are awarded to local applicants. Second, three points are awarded to applicants which are accredited schools, educational institutions or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[2] Fifth, one point is awarded to applicants which are existing E or F channel licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score, and petitions to deny are considered only if filed against the tentative selectee. *Second Report and Order*, 101 F.C.C. 2d at 76.

5. Under this comparative selection process, Sweeny, Columbia-Brazoria and Texas State Technical are awarded points based on the following criteria:

Localism. Sweeny and Columbia-Brazoria, governmental entities serving the formal educational needs of schools within their respective jurisdictions, are each entitled to four points for being local. Texas State Technical, located in Waco, is approximately 160 miles from Wharton, the nearest community to which it proposes service. However,

[1] Texas State Technical's application listed no receive sites located on its campus and indicated that it proposed to transmit programming to its own enrolled students in the Wharton area. Consequently, pursuant to the staff's written request of October 26, 1992, Texas State Technical submitted information bringing it into compliance with Section 74.931(a)(1). That section requires that an applicant proposing to serve its own enrolled students solely at locations off campus name the degree or diploma for which the formal programming will be offered and describe how the courses will be administered at each site.

[2] One point is awarded for a proposed schedule of at least 21 average hours per channel per week of formal educational programming or of at least 41 average hours per channel per week of other ITFS programming. Two points are awarded for a proposed schedule of at least 41 average hours per channel per week of formal educational programming or at least 61 hours per channel per week of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. §74.913(b)(4).

because Texas State Technical proposes to offer courses to its own enrolled students at off-campus locations in the Wharton area for credit toward a Texas State Technical degree,[3] it is deemed local and is also entitled to four merit points. *See* 47 C.F.R. §74.932, Note 1; *Instructional Television Fixed Service - Second Report and Order Recon. in MM Docket 83-523*, 59 R.R. 2d 1355, 1368 (1986).

Accreditation. Sweeny and Columbia-Brazoria, accredited by the Texas Education Agency, and Texas State Technical, accredited by the Southern Association of Colleges and Schools, are all applying within their respective jurisdictions. Therefore, each is entitled to three points for accreditation.

Four-Channel Limitation. None of the applicants is the licensee of, or has filed applications for, additional ITFS channels in the Chalmers, Texas area. Consequently, each is entitled to two points for remaining within the four-channel limitation.

Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a program "grid." Where amounts and types of programming proposed in the schedule and in the grid are inconsistent, we shall consider as correct, for comparative purposes, the amount and type which result in the least number of points to the applicant, so long as the excess capacity lease permits that level of programming to be transmitted. *Hispanic Information and Telecommunications Network, Inc.*, 7 F.C.C. Rcd 5924 (1992). Sweeny's illustrative schedule indicates an average of 24.375 hours of ITFS programming per channel per week. Because the schedule does not indicate which ITFS programs are formal, or those to be delivered to enrolled students for credit, as requested in Question 5, Section IV of the application, we will consider the programming on Wharton's schedule as nonformal for the purpose of determining merit points. *Valley View Independent School District*, 7 F.C.C. Rcd 7228 (1992). In contrast, its programming grid proposes an average of four hours of formal educational programming per channel per week.[4] Because neither the schedule nor the grid establishes the threshold at which points are awarded, Sweeny is entitled to no programming merit points.

Both Columbia-Brazoria's illustrative schedule and grid indicate an average of 22.5 hours of formal educational programming per channel per week. Accordingly, Columbia-Brazoria is entitled to one programming merit point.

Texas State Technical's amended illustrative schedule and grid, submitted on July 22, 1992, the "B" cut-off date, indicate an average of 41 hours of formal educational programming per channel per week. Thus, Texas State Technical is entitled to two programming merit points.

E- and F- Channel Group Relocation. None of the applicants is the current licensee of an E or F channel seeking to relocate to other channels. Consequently, none is entitled to the one point for such applicants.

Total. Sweeny, Columbia-Brazoria and Texas State Technical are each entitled to points for being local, for being accredited, and for observing the four-channel limitation, for a total of nine points. In addition to those points, Columbia-Brazoria's proposed average of 22.5 hours of formal educational programming per week qualifies for one programming point, for a total of ten points, and Texas State Technical's proposed average of 41 hours of formal educational programming per channel per week qualifies for two merit points, for a total of 11 points. Thus, the selectee is Texas State Technical.[5]

OTHER MATTERS

6. Texas State Technical proposes to lease its excess capacity for non-ITFS use as permitted by Section 74.931, and has submitted a copy of the lease agreement it executed with United States Wireless Cable, Inc. (U.S. Wireless). Several provisions of the lease do not comply with the Commission's requirements for such agreements. First, in the event that Texas State Technical and U.S. Wireless are unable to reach agreement on additional renewal terms, the lease provides for a six-month continued leasing by U.S. Wireless on the licensed channels beyond Texas State Technical's license term. This provision is inconsistent with the Commission's maximum term for excess capacity leases. *Instructional Television Fixed Service - Report and Order in Gen. Dockets 90-54 and 80-113*, 5 F.C.C. Rcd 6410, 6416 (1990). Second, although the lease provides for consultation with Texas State Technical regarding location of the transmitter site, another provision gives U.S. Wireless unilateral authority to change this site. We view this as inconsistent with the responsibility of the ITFS licensee to ensure the adequacy of its service. *Second Report and Order*, 101 F.C.C. 2d at 90. Finally, the lease affords U.S. Wireless an impermissible amount of control with regard to the ITFS license in that if Texas State Technical terminates its ITFS activities, it is "obligated to execute an assignment of all of its rights to any ITFS Licenses or license applications covered by this agreement or other FCC authorizations directly related to such ITFS licenses to any FCC qualified entity designated by [U.S. Wireless]." Although these provisions are inconsistent with our requirements for excess capacity leases, they neither reflect on the applicant's basic or comparative qualifications nor preclude grant of an authorization. *Van Vleck Independent School District*, 7 F.C.C. Rcd 7231, 7233 (1992). Accordingly, Texas State Technical's authorization will be conditioned upon conformity of the lease to Commission requirements. Additionally, although a petition to deny Texas State Technical's application was filed, it was later withdrawn.[6] We find Texas State Technical to be fully qualified.

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[3] The mission of the Texas State Technical College System is to "contribute to the educational and economic development of the State of Texas by offering occupationally oriented programs with supporting academic course work, emphasizing highly specialized advanced and emerging technical and vocational areas for certificates of associate degrees." Tex. Educ. Code Ann §135.01(b)(Vernon Supp. 1992).

[4] Sweeny's programming grid, which represents that there will be at least some formal educational programming, is sufficient to satisfy the programming requirements of Section 74.931(a).

[5] Therefore, we need not consider the petition to deny Sweeny's application filed by Region IV Education Service Center, the licensee of WHR-492, operating on the A channels at Crosby, Texas.

[6] Columbia-Brazoria filed, and later withdrew, a pleading cap-

7. Accordingly, IT IS ORDERED, That the application of Texas State Technical College (BPLIF-911009DC) IS GRANTED, subject to the condition that within 30 days from the date of this Order, Texas State Technical College submits to the Chief, Distribution Services Branch for approval information demonstrating compliance with Commission requirements, including, if appropriate, an amended excess capacity lease conforming to the requirements discussed herein. The applications of Sweeny Independent School District (BPLIF-910613DB) and of Columbia-Brazoria Independent School District (BPLIF-911008EO) ARE DENIED.

8. The staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

tioned "Petition to Dismiss or Deny." However, it raised only procedural issues which subsequently became moot. Therefore, the pleading need not be further considered.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 92-151

In the Matter of

Federal Access to Low Power 18 GHz Private Operational Fixed Microwave Systems — RM-7839

REPORT AND ORDER

Adopted: May 3, 1993; **Released: May 14, 1993**

By the Commission:

I. INTRODUCTION

1. This *Report and Order* amends Section 94.17(a)(1) of the Commission's Rules[1] to permit federal government users to be served by Part 94 licensees operating, on a for-profit, private carrier basis, 18 GHz low power systems licensed on digital termination system (DTS) channels. This action will extend to federal users access to wireless local area networks without adversely affecting the availability or quality of this service to non-federal users.

II. BACKGROUND

2. Under the current rules, licensees may operate multiple, low power point-to-multipoint transmitters on frequencies in the 18 GHz band at sites anywhere within a 28 kilometer (17.5 mile) radius of the reference coordinates listed on their license.[2] All private operational fixed licensees, including those with 18 GHz low power authorizations, may share their systems' excess capacity on a for-profit, private carrier basis under Section 94.17(a) of the Rules. Users of such private carriers, however, must themselves be eligible for licensing under Part 94.[3] The federal government is not a Part 94 eligible and, therefore, cannot be served by 18 GHz low power licensees.

3. On July 1, 1992, we adopted a *Notice of Proposed Rule Making* (*Notice*) to consider modifying Section 94.17(a)(1) to allow federal users to be served by 18 GHz low power licensees.[4] We tentatively concluded that the proposed amendment was in the public interest because it would increase communications options available to federal entities without an adverse impact on service quality or availability to non-federal users.[5] In response to the *Notice*, we received comments from Motorola, Inc. (Motorola) and no reply comments.[6]

III. DISCUSSION

4. Low power 18 GHz systems are used to connect computing devices in an office, manufacturing, or industrial complex by radio link. Computing devices, when connected by wire or radio signals, communicate with each other via a "local area network" (LAN).[7] Wireless LANs use radio signals instead of hard wiring to connect computing devices.[8] This permits untethered, flexible utilization that allows users to connect computing devices wherever the wireless LAN's radio signal reaches. This, in turn, allows work stations to be situated at the most efficient locations instead of limiting users to the path of a wired LAN. Wireless LANs also overcome the high cost, delay and difficulty often encountered in installing, expanding, or changing hard-wired LANs. Wireless LANs, moreover, can also overcome older design and construction techniques that did not contemplate the complex communication wiring otherwise needed to support the electronic office.[9]

5. Motorola, in its comments, supports our proposed amendment to § 94.17(a)(1). According to Motorola, permitting federal users to be served by Part 94 licensees operating 18 GHz low power systems would provide federal users access to reliable, cost effective LAN systems.[10] This, in turn, would improve federal government efficiency and productivity.[11] Motorola, which as noted currently markets

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[1] 47 C.F.R. § 94.17(a)(1).

[2] *See* 47 C.F.R. § 94.88. Licensees operate these systems on one of the five 18 GHz DTS channel pairs listed in 47 C.F.R. § 94.65(j)(8). *Id.* Although these channels are paired, licensees may subdivide them and typically operate each half of their channel independently. *See generally* Report and Order, PR Docket No. 88-91 (*"18 GHz Report and Order"*), 5 FCC Rcd 1220 (1990). The Commission will license a system operator on more than one channel in the same area only if the applicant demonstrates that the spectrum will be fully utilized. *See* 47 C.F.R. § 94.65(j)(8)(i); *18 GHz Report and Order* at n.69.

[3] Eligibility criteria for Part 94 authorizations is set forth in Section 94.5 of the Commission's Rules, 47 C.F.R. § 94.5.

[4] Notice of Proposed Rule Making, PR Docket 92-151 7 FCC Rcd 4527 (1992).

[5] *Notice* at para. 6.

[6] Motorola filed the petition for rule making (petition) that requested the modification to Section 94.17 now before us. Informal comments in support of Motorola's petition were filed by Control Cable, Inc., Threshold Technology, and BDS, Incorporated.

[7] A local area network is "[a] data-communications system . . . that allows . . . digital devices to talk to each other over a common transmission medium. Communications can also take place among diverse equipment types . . . . A local network provides such communications over a limited geographical area: a floor, a section of a building, an entire building or a cluster of buildings or in a multistory building or factory complex. Distances can vary from a few hundred feet to several miles." Rudolf F. Graf, *Modern Dictionary of Electronics,* 6th ed., Howard W. Sams & Company (1989) at 570-571.

[8] Motorola calls its wireless LAN system "ALTAIR." These systems are currently operating in most U.S. metropolitan areas. Comments of Motorola at 2.

[9] *See Notice* at para. 5.

[10] Comments of Motorola at 2-4. According to Motorola, "[m]any buildings prevalent in the government sector are more than 30 years old, with designs and construction techniques that do not readily accommodate complex communications wiring . . . . [R]eliable, cost effective, wireless LAN systems operating at 18 GHz can significantly improve efficiency and productivity in such an environment." *Id.* at 2.

[11] "[W]hile LAN sales are consistent across all industry segments including government, one of Motorola's market studies

wireless LAN systems to non-federal users, states that federal users can be served without any adverse impact on non-federal users because 18 GHz wireless LAN systems are low power, operate on exclusive channel assignments, and are designed to permit significant spectrum reuse within the 28 kilometer (17.5 mile) radius covered by each license.[12] Motorola also contends that extending service to federal users as proposed is consistent with related Commission precedent.[13]

6. We conclude that adopting the proposed amendment to Section 94.17(a)(1) is in the public interest. Extending the availability of wireless LANs to federal users will satisfy an identified communication need of federal users without adverse impact on non-federal users. The low power and frequency reuse design of 18 GHz low power systems produces high capacity systems that are capable of meeting the communications requirements of both federal and non-federal users, without reducing service quality or availability to the latter.[14] Retaining the restriction, therefore, would merely impose unnecessary costs on federal users -- and taxpayers -- with no resultant benefit to non-federal users. Furthermore, extending the options available to federal users would increase the potential customer base for 18 GHz low power licensees and enhance spectrum-use efficiency by permitting licensees authorized to use a channel exclusively in an area to serve as many users as possible.[15]

7. We also note that frequencies are currently not allocated to the federal government in the 18 GHz band for wireless LAN operation, whereas the record reflects that 18 GHz equipment is currently manufactured, and marketed "off-the-shelf" for non-federal users.[16] The record also reflects an unmet demand by federal users for wireless LANs.[17] Under our current restriction, therefore, wireless LAN equipment operating on frequencies allocated to the federal government would have to be separately manufactured and marketed, imposing delay and additional costs on federal users seeking to employ wireless LANs.[18]

8. Our decision extending service by 18 GHz low power licensees to federal users is also consistent with related precedent. For example, we amended our Rules in 1988 to allow federal government entities to be end users of 800 and 900 MHz Specialized Mobile Radio (SMR) systems.[19] We recognized at that time that SMRs are high capacity systems operating on exclusive assignments and thus are capable of serving a broader range of eligible users without diminishing service quality or availability to non-federal users.[20] We also found that expanding SMR end user eligibility to the federal government would increase the federal government's communications options, increase the potential customer base for SMR operators, and enhance spectrum efficiency by allowing a licensee assigned a channel(s) on an exclusive basis to serve a larger class of users.[21] Extending availability of 18 GHz wireless LAN service to federal users presents analogous considerations since these systems are high capacity and operate on channels assigned on an exclusive basis.

9. We also amended our Rules in 1989 to permit federal users to be end-users of paging only systems in the Business Radio Service and the 929-930 MHz band.[22] We extended end user eligibility for this paging service to the federal government because these systems are also high capacity and because established National Telecommunications and Information Administration policies provide that the federal government typically should not use federal government frequencies to provide telecommunications service to government agencies unless commercial services are unavailable, not suitable, or significantly more expensive.[23] The record of the instant proceeding reflects analogous considerations, *i.e.*, that (1) commercial service would be readily available absent the current regulatory prohibition, (2) the commercial service that would be available would be suitable for federal users, and (3) the commercial service would be less expensive than separate government-only wireless LAN service or hard-wired LANs.

10. We note, finally, that the Commission has granted several requests for waiver of Section 94.17(a)(1) to permit the federal government access to 18 GHz low power systems after determining that the federal agencies involved

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showed the government sector has the greatest desire for *wireless* local area network capabilities." Motorola Petition at 14. *See also* Comments of Motorola at 3.

[12] Comments of Motorola at 4. *See also Notice* at para. 5.

[13] Comments of Motorola at 4.

[14] See *Notice* at paras. 5-6, Comments of Motorola at 4. Federal government participation on 18 GHz low power systems should be no more disruptive to non-federal users than the operations of state and local government agencies, which have always been eligible to be served by 18 GHz low power licensees. *Accord*, Report and Order in PR Docket No. 86-404 (*"SMR Report and Order"*), 3 FCC Rcd 1838, para. 32 (1988).

[15] *Notice* at para. 6; *accord SMR Report and Order* at paras. 17 and 35.

[16] *See, e.g.*, 47 C.F.R. § 2.106 (frequencies in the 18.8-19.7 GHz band are not allocated for federal government use and adjacent bands are not allocated for fixed government use on either a primary or secondary basis).

[17] See note 12, *supra*.

[18] It is not clear that any frequencies allocated to the federal government would be suitable for wireless LAN operation. *See, e.g.*, Comments of Motorola at 3. There is also no certainty that any manufacturers would actually market separate equipment for federal users if frequencies available to the federal government were suitable for wireless LAN operation.

[19] *See SMR Report and Order* at paras. 15-35.

[20] *See Id.* at paras. 17 and 29-30.

[21] We noted that "[e]xpanding eligibility to include federal government entities . . . simply increases the number of *potential* SMR users. It does not require any SMR to serve [federal users] and it will not necessarily cause SMRs to displace current users." *SMR Report and Order* at para. 30.

[22] *See* Report and Order in PR Docket No. 89-45 (*"Paging Report and Order"*), 6 FCC Rcd 542, paras. 12-14 (1991).

[23] *See Paging Report and Order* at para. 13 (citing National Telecommunications and Information Administration, U.S. Department of Commerce, NTIA TELECOM 2000, at 376 (1988)). We noted in that proceeding that, as a result of NTIA's criteria, the federal government relies very heavily on the private sector for its telecommunications service. *Paging Report and Order* at para. 13. *See also SMR Report and Order* at paras. 28 and 32 (we noted that NTIA, in comments, stated that it is not always economical for federal government entities to operate their own communication systems).

had no reasonable alternatives[24] We have considered prior waiver grants -- consistent with the proposed rule changes then before us -- relevant in analogous proceedings.[25]

IV. CONCLUSION

11. We are amending Section 94.17(a)(1) to permit federal government users to be served by Part 94 licensees operating, on a for-profit, private carrier basis, 18 GHz low power systems licensed on digital termination system channels. This amendment will extend access to wireless local area networks to federal users without adverse impact on non-federal users.

V. FINAL REGULATORY FLEXIBILITY ANALYSIS

12. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

Need and Purpose of the Action

13. The Commission is adopting the rule change to allow 18 GHz low power licensees to serve federal entities as end-users. Allowing federal users access to 18 GHz low power systems will improve government efficiency and productivity by providing access to reliable, cost effective LANs. Allowing access to federal users will not adversely affect service quality or availability of wireless LANs to non-federal users including small businesses. 18 GHz systems are low power and re-use significant spectrum within the 17.5 mile radius covered by each license. This produces high capacity systems capable of meeting the wireless LAN communications requirements of both non-federal and federal users.

Issues Raised in Response to the Initial Regulatory Flexibility Analysis

14. There were no comments submitted in response to the Initial Regulatory Flexibility Analysis.

Significant Alternatives Considered and Rejected

15. All significant alternatives have been addressed in this Report and Order.

VI. ORDERING CLAUSES

16. Accordingly, IT IS ORDERED that, pursuant to the authority of Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r), Part 94 of the Commission's Rules, 47 C.F.R. Part 94, IS AMENDED as set forth in the Appendix below, effective [thirty days after publication in the *Federal Register*].

17. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

18. For further information concerning this *Report and Order*, contact Peter Daronco, Private Radio Bureau, Land Mobile and Microwave Division, Rules Branch, (202) 632-7125.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 94 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

Part 94 - Private operational-fixed microwave service

1. The authority citation for Part 94 continues to read as follows:

AUTHORITY: Sections 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. § 154, and 303, unless otherwise noted.

2. Section 94.17 is amended by revising paragraph (a)(1) to read as follows:

§ 94.17 Shared use of radio stations and the offering of private carrier communications service.

(a) * * *

(1) Persons or governmental entities licensed to operate radio systems on any of the frequencies set out in § 94.61(b) may share such systems with, or provide private carrier service to, any eligible for licensing under this part, regardless of individual eligibility restrictions enumerated in § 94.61(b), provided that the communications carried are permissible under § 94.9. In addition, persons or governmental entities licensed to operate low power systems under the provisions of § 94.88 may share such systems with, or provide private carrier services to, Federal Government entities, provided the communications carried are permissible under § 94.9.

* * * * *

[24] *See, e.g.*, Request for Waiver of Section 94.17(a)(1) by Station WNTE-775 (Private Radio Bureau 1992); Request for Waiver of Section 94.17(a)(1) by Stations WNTE-799, WNTE-850, WNTE-868 and WNTE-936 (Private Radio Bureau 1992); Request for Waiver of Section 94.17(a)(1) by Station WNTE-936 (Private Radio Bureau 1991). *See also* Order, In re the Applications of State of Idaho, 3 FCC Rcd 5910 (1988); *accord*, Request for Waiver of Pass Word, Inc., 5 FCC Rcd 1180 (1990).

[25] *See, e.g., SMR Report and Order* at para. 32; *Paging Report and Order* at para. 12.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

FOX TELEVISION STATIONS, INC. CSR-3652

Petition for Declaratory Ruling

MEMORANDUM OPINION AND ORDER

Adopted: May 5, 1993; Released: May 14, 1993

By the Commission:

1. On December 6, 1991, Fox Television Stations. Inc., licensee of Television Broadcast Station KDAF (Ind., Channel 33), Dallas, Texas, filed a "Petition for Declaratory Ruling" claiming that it essentially had become a "new" station when it switched from Spanish language to English language programming on July 30, 1984. As a result, KDAF argued that the Commission should recognize the county-wide Arbitron survey it submitted with survey data from May 1986, July 1986, November 1986, and February 1987 to demonstrate that KDAF is significantly viewed in the following Texas counties, pursuant to §76.54(d) of the Commission's Rules: Collin, Dallas, Denton, Ellis, Hunt, Johnson, and Tarrant.[1] An opposition to this petition was filed on January 17, 1992, by KXTX, Inc., licensee of Station KXTX-TV (Ind., Channel 39), Dallas, Texas and KDAF filed a reply to it on February 6, 1992. Supplemental pleadings were submitted on February 28 and April 30, 1992, by KDAF, and on May 12, 1992, by KXTX-TV.

2. As part of its 1972 regulatory scheme for cable television, the Commission limited the number of distant signals a cable system could import from outside its market. Exemptions to these limits, however, were made for both significantly viewed signals and for specialty stations. A signal is considered to be significantly viewed if it meets certain designated minimum viewership levels off-the-air. Although the Commission deleted its distant signal carriage limitations in 1982, the Commission continues to utilize the significantly viewed status of signals for various purposes, such as exemption from the Commission's program exclusivity rules. 47 C.F.R. §§76.92(f), 76.156(a). The Copyright Office has also continued to recognize significantly viewed signals for purposes of determining royalty payments rates: the carriage of significantly viewed stations by cable systems incurring lesser fees than the carriage of distant stations.

3. In establishing the category of significantly viewed stations, the Commission published a nationwide list, county-by-county, of those stations initially deemed to be significantly viewed. Stations not included in this list may be added in one of two ways. Any station may demonstrate that it meets the requisite viewership levels utilizing current community-specific data. 47 C.F.R. §76.54(b). Alternatively, a new station, that is a station not operating at the time of the original surveys which established the 1972 list, may utilize county-wide data to establish significantly viewed status, provided that such data is from the station's first three years of operations. 47 C.F.R. §76.54(d). For purposes of this rule, the Commission has extended "new" station status to stations shifting from subscription or noncommercial status to commercial status after the initial survey period. *See H.R. Broadcasting Corp. of Milwaukee, Inc.*, Cable Television Actions Report No. 3212 (released April 10, 1989); and *Blair Broadcasting of Oklahoma, Inc.*, Cable Television Actions Report No. 2800 (released October 14, 1983), respectively.

4. In its pleading, KDAF argues that it increased its Grade B coverage by 21.7 percent (and, due to certain demographic changes, it also increased the population it serves by 27.44 percent), when it raised its operating power level from 2140 kW to 5000 kW on July 30, 1984. At that time, KDAF also abandoned the Spanish language format it had utilized from the date it originally began operations in 1980. According to KDAF, these changes effectively transformed it into a "new" station, since it was suddenly serving an entirely different, English speaking, audience. This case is analogous, states KDAF, to other situations previously recognized by the Commission as resulting in changes so substantial that pre-existing stations were considered to be essentially "new" for purposes of establishing their significantly viewed status. *See Calvert Telecommunications Corporation*, 63 FCC 2d 1022 (1977), where there were extensive technical improvements; *H.R. Broadcasting Corp. of Milwaukee, Inc., supra;* and *Blair Broadcasting of Oklahoma, Inc., supra.*

5. In response, KXTX-TV states that KDAF's power increase in 1984 is insufficient by itself to make the station essentially "new", citing *Calvert Telecommunications Corp., supra,* where the Commission recognized that an increase of forty percent in the station's Grade B coverage had essentially transformed it into a "new" station. Furthermore, KXTX-TV contends that the Commission has never considered population growth in the market as a whole to be relevant to a request for new station status, and that the Commission has previously rejected the argument that a change from specialty station status to commercial programming might be sufficient to be considered a "new" station in *Nationwide Communications, Inc.*, 6 FCC Rcd 52 (1991), and in *KXTX, Inc.*, 6 FCC Rcd 68 (1991). [2] Moreover, KXTX-TV argues that potentially many of KDAF's viewers were the same people before and after its language change, and that KDAF's existing potential audience base

[1] Section 76.5(i) of the Commission's Rules requires an independent station to attain a 2% share of viewing hours (total week hours) and a net weekly circulation of at least 5%. For each of the counties where KDAF requests significantly viewed status, the following table indicates KDAF's share of total weekly viewing hours (Total Share) and its average net weekly circulation share (NWC Share) in noncable homes.

County	Total Share	NWC Share
Collin	3	43
Dallas	4	40
Denton	6	46
Ellis	2	38
Hunt	2	43
Johnson	5	47
Tarrant	4	43

[2] Former §76.5(kk) of the Commission's Rules provided the

remained the same, just as it did in *KXTX* and *Nationwide*. In fact, KXTX-TV maintains that the Commission must reconsider *KXTX* if it grants KDAF's petition. According to KXTX-TV, KDAF has failed to meet the standard for waiver enunciated in *WAIT Radio v. FCC*, 459 F. 2d 1203 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972), because the switch cited by KDAF in *H.R. Broadcasting Corp., supra*, from STV to a non-scrambled signal involved a service which ". . . was literally unavailable to non-subscribers prior to the change." KXTX-TV adds that KDAF's switch is also not analogous to the change in *Blair Broadcastings of Oklahoma, supra*, since the commercial signal, in that case which previously had been noncommercial, was inherently "new" because noncommercial stations were not included in the initial audience surveys that the Commission had utilized to establish its 1972 list of significantly viewed signals. Finally, KXTX-TV notes that, even if the Commission rejects KDAF's claim of being essentially a "new" station, KDAF would still be able to conduct significant viewing surveys community-by-community, which KXTX-TV notes can be done quickly and inexpensively especially since cable companies should be willing to contribute financial assistance). ("*See* KDAF's opposition in *KXTX, Inc., supra*, at 69).

6. In reply, KDAF notes that its switch from Spanish to English language programming made it comprehensible, and therefore available for the first time, to a large new potential audience base, just as the Commission considered conversion from scrambled STV operations to commercial broadcast operations as "new" for purposes of significant viewing. KDAF adds that granting it relief will not necessitate reconsideration of *KXTX, supra*, since the switch from religious to commercial programming in that case was not such a fundamental change, and that in fact even after the switch, KXTX-TV stated that it still only broadcast "family-oriented" and religious programming and that its program content changes were not radical. *KXTX*, 6 FCC Rcd at 70.

7. Initially, we note that KXTX-TV is correct in stating that, without more, an increase of approximately twenty percent in a station's Grade B coverage is not sufficient to establish that the station should be treated as though it were "new" for significantly viewed purposes. *Grant Broadcasting of Philadelphia, Inc.*, Cable Television Actions Report No. 3110 (released September 8, 1987). However, we believe that a change from Spanish to English language broadcasting is the sort of fundamental operational change which warrants treating a station as essentially "new" for the purposes of establishing significantly viewed status. Unlike the switch from religious to commercial programming, a language change makes programming suddenly understandable to a far greater audience, who were previously precluded from utilizing the station's services. This change is similar to a station's switching from subscription programming to non-scrambled commercial programming, which becomes suddenly viewable to a far greater audience. Since the audience data submitted by KDAF for noncable homes in each of the counties listed exceeds the Commission's standard for an independent station of a two percent share of total viewing hours and a five percent net weekly circulation, KDAF is entitled to significantly viewed status in the following Texas counties: Collin, Dallas, Denton, Ellis, Hunt, Johnson, and Tarrant.

8. In view of the foregoing, we find that grant of KDAF's petition for declaratory ruling (CSR-3652) is in the public interest.

9. Accordingly, IT IS ORDERED, That the "Petition for Declaratory Ruling" filed December 6, 1991, by Fox Television Stations, Inc., licensee of Television Broadcast Station KDAF, Dallas, Texas, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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following definition of a specialty station: "A commercial television broadcast station that generally carries foreign language, religious, and/or automated programming in one-third of the hours of an average broadcast week and one-third of weekly prime-time hours."

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-64

In the Matter of

Policies and Rules Concerning
Changing Long Distance Carriers

Petitions for Reconsideration
and Clarification

ORDER

Adopted: April 23, 1993; Released: May 14, 1993

By the Commission:

I. INTRODUCTION

1. Touch 1 Long Distance Company (Touch 1) and the Interexchange Resellers Association (IRA) have filed petitions for reconsideration of the *PIC Verification Order*. That Order directed interexchange carriers to implement one of four procedures designed to verify customer orders for long distance service generated by telemarketing.[1] On March 9, 1992, MCI Telecommunications Corporation (MCI) petitioned for reconsideration, Southwestern Bell Telephone Company (SWB) petitioned for clarification, and the Bell Atlantic Telephone Companies (Bell Atlantic) petitioned for clarification or limited reconsideration of the order.[2] For the reasons set forth below we deny the petitions filed by Touch 1, IRA, MCI, and Bell Atlantic, and clarify the order to the extent described herein and otherwise deny the petition filed by SWB.

II. BACKGROUND

2. The Commission, in its *Allocation Order* and its subsequent *Waiver Order* and *Reconsideration Order*, set forth rules and procedures for implementing equal access and presubscription to an interexchange carrier (IXC).[3] The original allocation plan adopted by the Commission required IXCs to have a letter of agency (LOA) signed by the customer on file before submitting a primary interexchange carrier (PIC) change order to the local exchange carrier (LEC) on behalf of the customer.[4] After vigorous objections from IXCs, including American Telephone & Telegraph Company (AT&T), that this requirement would stifle competition, we modified the requirement to allow IXCs to place PIC change orders if they had "instituted steps to obtain signed LOAs."[5] In the subsequent *Illinois CUB Order*,[6] we denied a petition filed by the Illinois Citizens Utility Board to revise the Commission's carrier selection rules, but emphasized that the Commission did not intend that consumers be made financially liable, even temporarily, for PIC change charges for PICs which they did not authorize. We stated further that because LECs implement all change orders and bill end users for applicable charges, they cannot dismiss complaints that customers have been unfairly charged by referring the customers to the IXCs for resolution.[7]

3. Despite the adoption of the consumer protection mechanisms set forth in the *Illinois CUB Order*, the Commission continued to receive complaints that some customers had been switched to other carriers without the customers' permission. On January 10, 1990, AT&T filed a petition requesting revision of the Commission's carrier selection rules. It proposed returning to the Commission's original rules, allowing an IXC to submit PIC change orders to a LEC on a customer's behalf only when the IXC has an LOA for that customer on file. AT&T alleged that there had been an increase in unauthorized switching of customers during 1989, causing inconvenience for customers and creating expense for LECs who must resolve the resultant disputes.[8]

4. On December 11, 1990, AT&T and MCI informed the Commission that they had reached an out-of-court settlement of pending federal district court civil suits concerning AT&T's and MCI's marketing practices.[9] They agreed, as part of their settlement, to propose to the Commission that it adopt certain safeguards designed to protect customers against being switched without permission (the AT&T-MCI proposal).[10]

5. On March 25, 1991, this Commission released a Notice of Proposed Rulemaking[11] to consider revising PIC change rules for interstate long distance service. In the January 9, 1992 *PIC Verification Order*, we adopted rules revising verification of telemarketing sales. Specifically, we required IXCs that submit PIC change orders on behalf of customers to LECs to institute one of four confirmation

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[1] Policies and Rules Concerning Changing Long Distance Carriers, CC Docket No. 91-64, Report and Order, 7 FCC Rcd 1038 (1992) (*PIC Verification Order*).

[2] On April 29, 1992, Sprint Communications Company LP (Sprint) filed comments and US West Communications, Inc. (US West) filed a partial opposition in this proceeding.

[3] Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase 1, 101 FCC 2d 911 (1985) (*Allocation Order*), *recon. denied*, 102 FCC 2d 503 (*Reconsideration Order*); Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase, 1, 101 FCC 2d 935 (1985) (*Waiver Order*).

[4] *Allocation Order*, 101 FCC 2d at 929, Appendix B.

[5] *Waiver Order*, 101 FCC 2d at 942.

[6] *See* Illinois Citizens Utility Board Petition for Rulemaking, Memorandum Opinion and Order, 2 FCC Rcd 1726 (1987) (*Illinois CUB Order*).

[7] *See Id.* at 1729.

[8] AT&T Petition at 7.

[9] AT&T filed suit January 10, 1990 against MCI Telecommunications Corporation (MCI) in federal district court in New Jersey, alleging unfair telemarketing practices and unauthorized switching. MCI had previously filed suit against AT&T on October 10, 1989, alleging deceptive advertising practices.

[10] *See* Letter from James L. Lewis, MCI Telecommunications Corporation, to Secretary, Federal Communications Commission, December 12, 1990 (MCI Letter).

[11] American Telephone and Telegraph Company, Petition for Rulemaking, CC Docket No. 91-64, Notice of Proposed Rulemaking, 6 FCC Rcd 1689 (1991) (*PIC Verification NPRM*).

procedures before submitting orders to the LECs: (1) obtaining an LOA from the customer; (2) providing an 800 number for the customer to call to confirm the order to change PICs; (3) obtaining the customer's authorization by use of an independent third party verifier; or (4) (a) within three business days of the customer's request for a PIC change, the IXC must send each new customer an information package containing at least the names of the customer's current IXC and the new IXC, a description of any terms, conditions, or charges incurred, the name of the person ordering the change, the name, address, and telephone number of both the customer and the new IXC, and a postpaid postcard which the customer can use to deny, cancel, or confirm a service order; and (b) the IXC must wait 14 days after the information package is mailed to customers before submitting their PIC change orders to LECs. Petitioners challenge various aspects of this order.

III. PETITIONS FOR RECONSIDERATION AND CLARIFICATION

6. Petitions for reconsideration or clarification of the *PIC Verification Order* focus on three areas of concern: (1) determination of liability for disputed PIC changes; (2) verification procedures for customer orders for long distance service generated by telemarketing; and (3) necessity for clearer identification of customers' new PICs on LOAs.

A. Liability for Disputed PIC Change Charges and Related LOA Issues

7. The *PIC Verification Order* does not alter previous decisions that the IXC is responsible for charges associated with disputed PIC changes for which it cannot produce LOAs.[12] MCI and Sprint argue that IXCs should not be liable for disputed PIC change charges if IXCs demonstrate that they have complied with one of the four verification procedures adopted in the Order.[13] According to MCI, our adoption of four verification procedures indicates that an LOA is not the only way to verify a customer's PIC change order, and that the Commission therefore should not require IXCs to produce LOAs to settle PIC change disputes.[14] Sprint contends that IXCs should not be required to produce LOAs to settle PIC disputes because it finds that the verification required by the *PIC Verification Order* is quite effective in minimizing unintended PIC changes. Moreover, says Sprint, copies of IXCs' electronic records of verified telemarketing sales should suffice to show LECs a verified sale was made and relieve IXCs of any liability for unauthorized PIC change charges.[15] Sprint also contends that many PIC change disputes may be simply buyer's remorse or disagreements within a household, disputes for which the IXC should not be held liable. Sprint also states that "only about 4 percent" of LOAs are returned to IXCs by customers gained by telemarketing. Therefore, it argues, unauthorized PIC change charges should not be levied against carriers who have in good faith complied fully with the verification requirements.[16]

8. US West and SWB support IXC liability for disputed PIC changes for which they cannot produce LOAs. US West contends that MCI's proposal would unfairly shift the burden of proof in PIC change disputes to consumers, who would find it both difficult and uneconomic to prove that they had not ordered a change in long distance service.[17] According to US West, MCI's proposal would lead to an increase in PIC change disputes and would place LECs in the unenviable position of billing consumers for disputed PIC changes.[18]

9. MCI and Sprint have presented this Commission with no new evidence to persuade us that they should be relieved of their responsibility for charges associated with disputed PIC changes for which they are unable to produce LOAs. The verification procedures that we adopted in the *PIC Verification Order* provide consumers additional protection against switching of a customer's long distance service without authorization. These verification procedures were not intended to substitute for written authorization from customers as evidence in a PIC change dispute.[19] MCI and Sprint have failed to demonstrate why IXCs should be relieved of their burden of proof (having on file and producing LOAs) in the event of disputed PIC changes.

10. SWB also asks us to clarify whether the requirement to produce LOAs also applies to PIC change orders obtained by in-person or mail solicitation, and whether IXCs are required to keep LOAs for only 12 months, and, if this is the case, whether LECs should automatically disallow customers' disputed PIC change claims that arise more than 12 months after the PIC change is made.[20] In response, Sprint recommends that we should allow LECs to automatically disallow customers' claims that occur more than 90 days after a PIC change. By then, says Sprint, end users should have received at least two bills from their new IXC in addition to welcome packages, verification contacts, and other informational and promotional contacts. Sprint argues that it is safe to presume that customers' disputes occurring more than 90 days after a PIC change are simply a change of mind and IXCs should not be held liable.[21]

11. The Commission has steadily maintained the importance of the LOA as a consumer protection mechanism.[22] We stated that LOAs were designed to be used in dispute resolution and that the dispute resolution procedures and the requirement that IXCs obtain LOAs from their customers "were designed to ensure that end users were afforded protection both from mistakes made by the LECs during the conversion process and from I[X]C marketing abuses."[23] Our *PIC Verification Order* was not intended to diminish those protections. IXCs must obtain LOAs for use in resolving disputes regarding all changes in customer service. Moreover, IXCs must continue to retain the LOAs for a period of 12 months.[24] Retention of the LOAs for 12

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12 *See Illinois Cub Order*, 2 FCC Rcd at 1729.
13 MCI Petition at 1-2; *see also* Sprint Comments at 7-8.
14 MCI Petition at 2-3.
15 Sprint Comments at 7-8.
16 *Id.* at 8.
17 US West Opposition at 2-3.
18 *Id.* at 2-3; *see also* SWB Petition at 3-4.
19 An exception, however, is the first verification option, which requires collecting an LOA prior to submitting the PIC change order.
20 SWB Petition at 1-2 and at 4, n.3.
21 Sprint Comments at 8-9.
22 *See Illinois Cub Order*, 2 FCC Rcd at 1729. *See also Allocation Order* at 929.
23 *Id.*
24 *See Allocation Order* at 929-30.

months is necessary to afford customers sufficient time to discover and pursue any complaints regarding unauthorized switching of their long distance carrier. Sprint has not demonstrated that revising the Commission's PIC change procedures to permit LECs to disallow PIC change disputed claims that arise more than 90 days after a PIC change sufficiently protects consumers. We therefore conclude that we should not shorten the 12-month period afforded customers for disputing PIC claims.

B. Verification Procedures

12. Parties raised several issues regarding the four verification procedures. Touch 1 requests that we permit other verification procedures in addition to the four specified in the *PIC Verification Order*. Specifically, Touch 1 would like to use either its own in-house verification procedure, whereby Touch 1's telemarketer tape records customers' telephone conversations in which their PIC change orders are confirmed, or allow IXCs to choose verification procedures not adopted in the Order, provided IXCs make those procedures available to the public in a written policy statement.[25] According to Touch 1, its in-house verification procedure is superior to the procedures adopted in the *PIC Verification Order* because it provides the "most tangible evidence possible" of a sale having been made.[26] Touch 1 argues that requiring it to change its confirmation procedures to comply with the *PIC Verification Order* would harm Touch 1 and its customers.[27] Touch 1 also claims that changing its confirmation procedure to that of independent third-party verification would triple its verification costs.[28]

13. This Commission tentatively concluded in the *PIC Verification NPRM*[29] that modification of carrier selection procedures was necessary to protect the interests of consumers. We carefully considered comments made by carriers in that proceeding that in-house verification of telephone sales provided sufficient protection to consumers. Although Touch 1 failed to file comments in response to the *PIC Verification NPRM*, Sprint offered a similar argument to that made by Touch 1. We weighed these comments against arguments by other parties that the purpose of the revised verification procedures was to create independent, unambiguous evidence of customer choice and to eliminate or reduce the abuses caused by overzealous carrier telemarketing activities.[30]

14. Touch 1 is not required to choose third-party verification because we provided three other verification options from which to choose. Moreover, in opting for third-party verification as one of the four options available for carrier use, we noted that carriers concerned about the costs of such verification could select the fourth option. The fourth option, in particular, requires only a slight modification to the information packets which carriers are currently required to send new customers, and allows carriers to provide service and earn revenue during the waiting period via their 10XXX codes. We note that customers who have selected a carrier as a result of a telemarketing sale may immediately begin to use its services, if they wish, by simply using the carrier's 10XXX code, which can be supplied to them when they agree to order service. We also note that Touch 1 appears to have adopted its in-house verification program only recently and in the face of concerns voiced about such programs by this Commission, by members of Congress, and by commenting parties.[31] Finally, Touch 1 has provided no evidence to persuade us that its in-house verification offers sufficient protection to consumers. Touch 1's petition for reconsideration will therefore be denied.[32]

15. SWB urges us to clarify that the requirement to verify PIC change orders by one of the four verification procedures applies to LEC-owned payphones as well as to customer-owned payphones.[33] In the *PIC Verification Order* we required that the verification procedures for telemarketing sales of long distance service apply to customer-owned payphones. We now clarify that these procedures apply to LEC-owned payphones as well. We conclude that the entities responsible for authorizing presubscription of LEC-owned payphones are subject to the same unauthorized PIC change problems that occur with customer-owned payphones and that they are therefore entitled to the same protections adopted in the *PIC Verification Order*.

16. MCI asks us to eliminate the requirement that IXCs using the fourth verification option provide the name of customers' current PICs in the information packages IXCs send to new customers. MCI characterizes this requirement as burdensome and unnecessary to verify that customers have agreed to change a PIC. Moreover, argues MCI, PIC changes may be delayed because some customers may not be able or willing to provide this information to their new IXCs.[34] Sprint adds that LECs are reluctant to provide the

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[25] Touch 1 Petition at 7.

[26] *Id.* at 3-5.

[27] *Id.* at 2. At the time of its petition, Touch 1 had been using its verification procedure for only four months. Touch 1 adopted its in-house verification program approximately two months before this Commission's then-pending rulemaking regarding unauthorized switching and in the face of concerns voiced by the Commission, by members of Congress, and by commenting parties that in-house verification does not create unambiguous evidence of customer choice that is totally independent of IXCs' marketing operations.

[28] *Id.* at 7. Touch 1 presented these same arguments in its petition for waiver and motion for stay of the *PIC Verification Order*, which the Bureau denied in its *Waiver Denial Order*. *See* note 29, *infra*.

[29] American Telephone and Telegraph Company, Petition for Rulemaking, CC Docket No. 91-64, Notice of Proposed Rulemaking, 6 FCC Rcd 1689 (1991) (*PIC Verification NPRM*).

[30] *See PIC Verification Order*, 7 FCC Rcd at 1041.

[31] On April 2, 1992, the Common Carrier Bureau denied petitions for waiver and motions for limited stay of the *PIC Verification Order* filed by Sprint and Touch 1. Policies and Rules Concerning Changing Long Distance Carriers, CC Docket No. 91-64, 7 FCC Rcd 2600 (1992) (*Waiver Denial Order*). On April 24, 1992, Touch 1 filed both an application for review and a motion for a limited stay of the *Waiver Denial Order* presenting identical arguments to those raised in its petition for waiver and motion for limited stay. Given the disposition of these same issues in this Order, Touch 1 has demonstrated no reason to reverse the Bureau's order. We therefore deny both of these petitions.

[32] Touch 1 also filed an application for review of the *PIC Verification Order* which raises the same arguments as its Petition for Reconsideration. We also dismiss Touch 1's application for review.

[33] SWB Petition at 4.

[34] MCI Petition at 3.

name of customers' previous carriers because of computer systems limitations or concerns about disclosing competitively sensitive information.[35]

17. We do not agree that IXCs using the fourth verification option should be relieved of their requirement to provide the name of customers' current PICs in the information package these IXCs send to new customers. This requirement is an important element of consumer protection that serves to more fully inform customers that they are agreeing to switch their current long distance carrier to another. MCI and Sprint have not demonstrated that the burden of providing this information outweighs its benefit to customers. This additional information ensures that consumers are made aware that they are switching from their current long distance carrier, and may serve to reduce the number of claims of unauthorized switching with which IXCs must contend.

18. IRA requests that we apply the verification methods to AT&T's administration of SDN and DNS reseller accounts. IRA notes that it raised this same issue in its comments to the *PIC Verification NPRM*. [36] IRA complains that AT&T is "jamming" -- refusing to connect an end user currently taking service from a reseller of AT&T's data base virtual private line SDN or DNS services to another reseller of those services unless the first reseller provides AT&T with an order to disconnect the end user. However, complains IRA, AT&T does not require a disconnect order from the first reseller to connect end users of SDN or DNS services to AT&T non data base services such as PRO WATS.[37]

19. We conclude that IRA's petition complaining that AT&T is hindering the ability of resellers of its SDN or DNS services to enroll customers of another reseller of these services raises an issue that is outside the scope of this notice and comment proceeding, and which is more properly addressed by the Commission's complaint process, Section 208 of the Communications Act, 47 U.S.C. § 208, or other request for relief.

C. Identification of Customers' New PICs

20. Long distance service is also provided by switchless resellers. These resellers are IXCs that resell to their end users the long distance service provided by facilities-based IXCs such as AT&T, MCI, and Sprint. Switchless resellers are prevented for technical reasons from ordering their customers' long distance service directly from the LECs, but rather must order service through the facilities-based IXCs.

21. Bell Atlantic requests we clarify that LOAs used by switchless resellers must identify the IXC to whose network the end user will be switched, and that only this IXC may initiate a PIC change.[38] It asserts that because the presubscription and billing accounts used by the LECs identify the IXC as the end user's PIC, allowing LOAs to identify only a marketing agent, traffic aggregator, or other third party would cause customer confusion and increase the number of disputed PIC changes. Moreover, it contends, allowing third parties to submit PIC change orders requires LECs to police the legitimacy of entities with whom they have no business relationship and leaves no one clearly responsible for the cost of unauthorized switching of IXC service.[39]

22. Sprint protests that the ruling sought by Bell Atlantic simply cannot be implemented.[40] Sprint reiterates that switchless resellers are unable to order access facilities directly from LECs, to change end users' PICs, and, owing to a shortage of IXC identification codes, to identify themselves to LECs.[41] In order to identify switchless resellers of its service to LECs, Sprint reports it submits end users' orders to the LEC under its own 333 CIC code. In the event of a PIC change dispute, Sprint states that it furnishes to the LECs a "2-step LOA" -- a signed LOA from the end user designating the switchless reseller as its long distance carrier, and an LOA from the switchless reseller designating Sprint as its agent -- to link end users to the Sprint CIC code shown in the LECs' records. Sprint complains that although a number of LECs have honored Sprint's 2-step LOA, Bell Atlantic does not.[42]

23. Moreover, Sprint alleges that some LECs attempt to impose unauthorized PIC change charges on IXCs in instances where customers were not switched without authorization but were merely confused because their IXCs were resellers who could not readily identify themselves to LECs. Sprint states that it raised this issue at the Order and Billing Forum (OBF) in May 1991, and that on August 6, 1992, OBF agreed to use an indicator in the Customer Account Record Exchange (CARE) process to enable IXCs to inform LECs that particular automatic numbering identifiers (ANIs) represent reseller orders. Sprint reports that although two major LECs will soon be testing use of the CARE indicator to identify resellers' orders, most of the major LECs have not yet indicated when they will be prepared to support this indicator in their internal systems.[43]

24. Therefore, until the major LECs have adopted OBF's solution for identifying resellers in the LECs' systems, Sprint requests that we require LECs to honor its 2-step LOA in instances of PIC change disputes.[44] In addition, Sprint asks this Commission to require switchless resellers to include in post-sale information packages the disclosure form developed by Sprint to eliminate confusion on the part of resellers' customers.[45]

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[35] Sprint Comments at 9.
[36] IRA Petition at 2.
[37] IRA Petition at 1-2.
[38] Bell Atlantic Petition at 1-2. Bell Atlantic previously raised this issue in comments to the *PIC Verification NPRM*.
[39] *Id.* at 2.
[40] Sprint also opposes identifying only underlying IXCs on end users' LOAs for other reasons: (1) resellers would be forced to collect new LOAs from customers each time they changed underlying carriers, hindering their flexibility to change carriers in contradiction to the Commission's resale policies; (2) it would be inappropriate because switchless resellers, not the underlying IXCs, control end users' ANIs; (3) underlying IXCs might suffer harm to their reputations if end users are dissatisfied with the reseller's customer service or billing and collection service; and (4) underlying IXCs might incur expenses for handling misdirected service and billing complaints. Sprint Comments at 3-4.
[41] Sprint Comments at 2-3.
[42] *Id.* at 2.
[43] *See* Sprint Comments at 4-5 and letter to D. Searcy, Secretary, Federal Communications Commission, from H.R. Juhnke, General Attorney, Sprint Communications Company LP (Oct. 6, 1992).
[44] Sprint Comments at 5.
[45] *Id.* at 6.

25. The Commission has prescribed the content, but not the precise form, of LOAs in order to allow IXCs flexibility in their business operations while providing consumers protection against unauthorized PIC changes.[46] We conclude that Sprint's 2-part LOA contains all the information required by the Commission, and is, therefore, a valid LOA and should be treated as such by the LECs. We note that the telecommunications industry itself has adopted and is beginning to implement measures to permit ready identification of resellers in the LECs' records. We will not, therefore, at this time, interfere with the industry's efforts to solve this problem. However, if industry is unsuccessful in resolving this problem, we may consider initiation of a rulemaking in this matter. Finally, while our rules do not require resellers to employ the post-sale disclosure form that Sprint proposes, we strongly urge resellers to take reasonable steps to dispel their customers' possible confusion and forestall mistaken PIC change disputes.

IV. ORDERING CLAUSES

26. Accordingly, IT IS ORDERED that the petition for reconsideration of the *PIC Verification Order* filed by the Touch 1 Long Distance Company IS DENIED.

27. IT IS FURTHER ORDERED that the motion for a limited stay of the *PIC Verification Order* filed by the Touch 1 Long Distance Company IS DENIED and the application for review of the Order filed by the Touch 1 Long Distance Company IS DISMISSED.

28. IT IS FURTHER ORDERED that the petition for reconsideration of the *PIC Verification Order* filed by the Interexchange Resellers Association IS DENIED.

29. IT IS FURTHER ORDERED that the petition for reconsideration of the *PIC Verification Order* filed by MCI Telecommunications Corporation IS DENIED.

30. IT IS FURTHER ORDERED that the petition for clarification of the *PIC Verification Order* filed by the Southwestern Bell Telephone Company IS GRANTED to the extent described herein and IS otherwise DENIED.

31. IT IS FURTHER ORDERED that the petition for clarification or limited reconsideration of the *PIC Verification Order* filed by the Bell Atlantic Telephone Companies IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[46] *See Allocation Order*, Appendix B, at 928-29.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

First Commonwealth
Communications, Inc.,
Complainant

v. File No. PA-85-0016

Virginia Electric and
Power Company
d/b/a Virginia Power Company
Respondent

FEDERAL COMMUNICATIONS COMMISSION

Kenneth P. Moran
Chief, Accounting and Audits Division
Common Carrier Bureau

ORDER

Adopted: May 7, 1993; Released: May 14, 1993

By the Chief, Accounting and Audits Division:

1. On August 12, 1985, First Commonwealth Communications, Inc. (First Commonwealth) filed a complaint pursuant to Section 224 of the Communications Act of 1934, as amended, against Virginia Electric and Power Company (VEPCO).[1] The complaint alleged that VEPCO had imposed unreasonable inspection practices and guying standards during an inspection of First Commonwealth's cable attachments affixed to, and in the vicinity of, VEPCO's utility poles. After careful review of the record, the Common Carrier Bureau granted, in part, First Commonwealth's petition, and directed the parties to negotiate a monetary settlement pursuant to that Order.[2] Settlement negotiations ensued, and on April 29, 1993, First Commonwealth and VEPCO filed a joint motion requesting termination of this proceeding.

2. We are satisfied that termination of this proceeding will best serve the public interest. The parties have conducted discussions resulting in a mutually acceptable settlement of outstanding issues related to the complaint. Granting this motion eliminates the need for further litigation and the expenditure of further time and resources of the parties and this Commission.

3. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), and 224 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and 224, and Sections 0.91(j) and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91(j) and 0.291, that the motion to terminate the above-captioned proceeding IS GRANTED.

4. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

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[1] 47 U.S.C. § 224(b)(1).

[2] First Commonwealth Communications, Inc., Complainant, v. Virginia Electric and Power Company, d/b/a Virginia Power Company, Respondent, PA-85-0016, *Order*, 7 FCC Rcd 2614 (Com. Car. Bur. 1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 80-286

In the Matter Of

Amendment of Part 36 of
The Commission's Rules And
Establishment of a Joint Board

ORDER

Adopted: May 3, 1993; Released: May 14, 1993

By the Commission:

1. Pursuant to Section 410(c) of the Communications Act, 47 U.S.C. §410(c), the Honorable James H. Quello is appointed to serve as Chairman of the Federal-State Joint Board in CC Docket No. 80-286. This Joint Board was established in 1980 to address issues related to jurisdictional separations. This appointment fills the position recently vacated by the Honorable Alfred C. Sikes. Henceforth a copy of all filings in this proceeding shall be served on the Honorable James H. Quello at the following address:

The Honorable James H. Quello, Chairman
Federal Communications Commission
1919 M Street, N.W. - Room 802
Washington, D.C. 20554

2. Accordingly, IT IS ORDERED, that the Honorable James H. Quello, pursuant to Section 410(c) of the Communications Act of 1934, 47 U.S.C. §410(c), is appointed to, and shall serve as the Chairman of, the Federal-State Joint Board in CC Docket No. 80-286.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

GREAT WESTERN CELLULAR PARTNERS — File No. 10269-CL-P-492-A-88

For facilities in the Domestic Cellular Telecommunications Radio Service on Frequency Block A, in Market No. 492, Minnesota 11-Goodhue

MEMORANDUM OPINION AND ORDER

Adopted: May 3, 1993; Released: May 14, 1993

By the Commission:

I. INTRODUCTION

1. In this Order, we address a petition for reconsideration filed by Great Western Cellular Partners (Great Western) of our decision affirming the dismissal of its application by the Mobile Services Division (MSD). *Cellwave Telephone Services,* 7 FCC Rcd 5955 (1992). For the reasons discussed below, we deny reconsideration and affirm our previous decision.

II. BACKGROUND

2. On May 4, 1989, Great Western was named tentative selectee in the non-wireline lottery for the Minnesota 11 (Goodhue) Rural Service Area. Its application was subsequently dismissed by the Chief of the Mobile Services Division[1] because the applicant failed to comply with Section 310 (b)(3) of the Communications Act of 1934 (the Act) and Section 22.4 of the Commission's Rules by having an alien partner.[2] The MSD found that, at the time the referenced application was filed, Mary Scott Taylor, who is not a United States citizen, was a general partner in Great Western. On reconsideration we affirmed the MSD's dismissal of Great Western's application.[3]

3. In doing so, we found that there was no evidence on the face of the application indicating that Mary Scott Taylor and Jay F. Pritchett formed a valid limited partnership. Because P&T Limited Partnership (P&T), the partnership formed by Taylor and Pritchett, failed to file its certificate of limited partnership with the county clerk's office prior to filing its application with the Commission, we stated that we could not find that Taylor was a limited partner pursuant to the requirements of Section 310(b)(3) of the Act and Section 22.4 of our Rules. Great Western now asks that we reconsider our decision.[4]

III. DISCUSSION

4. In this latest reconsideration request, Great Western contends that our decision affirming the MSD's dismissal of its application was based upon an incomplete analysis of New Mexico state partnership law. In addition, Great Western argues that there are other independent grounds warranting reinstatement of its application.

5. Great Western argues that both the MSD and the Commission had the misconception that Mary Scott Taylor, a British citizen, was a general partner of Great Western at the time the application was originally filed. Under state partnership law, Great Western argues, "Pritchett and Taylor's oral agreement created, if not a limited partnership, then a valid *general* partnership." Petition at 6. Unlike limited partnerships, general partnerships, petitioner contends, can be created by oral agreement under the applicable state law. Great Western further maintains that its inclusion of the general partner, P&T, in the application was not a violation of Section 310 (b) of the Act and that Taylor's participation in the applicant was at all times through a sub-tier partnership. Applying the benchmarks adopted in *Wilner & Scheiner,* Great Western argues, Taylor can be attributed with, at most, only 5 percent participation of the P&T partnership, which is far below the threshold of 20 percent set forth in Section 310(b)(3). Thus, Great Western maintains that Taylor's indirect participation, through a sub-tier partnership, complies with the equity or voting interest limits set forth in Section 310(b)(3).

6. Great Western also argues it has not violated the Act because neither Taylor nor Pritchett is an officer or director. According to Great Western, there is no automatic violation of 310(b)(3) where a non-insulated alien partner is not itself a licensee or applicant. Petitioner contends that only officers and directors at the licensee level or at the level of a controlling entity are relevant. Furthermore, petitioner argues that Section 310(b)(4) only regulates alien participation as officers and directors of "companies which directly or indirectly control the licensee." Petition at 14, citing *Wilner & Scheiner,* 103 FCC 2d at 524. Here, it is argued, P&T is not a controlling entity of Great Western, nor is Taylor an officer, director, or general partner and, therefore, the Act has not been violated.

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[1] *See* Letter from Chief, Mobile Services Division, to S. Bramwell, dated Feb. 25, 1991.

[2] Section 310(b)(3) of the Act and Section 22.4 of the Commission's Rules prohibit the issuance of a common carrier authorization to a corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned by aliens. The Commission has held that the statutory proscription also applies to non-limited partners and non-insulated limited partners. *Wilner & Scheiner,* 103 FCC 2d 511 (1985), *reconsidered in part,* 1 FCC Rcd 12 (1986).

[3] Great Western's petition was considered by the Commission along with the petitions of Cellwave Telephone Services, L.P. and Futurewave General Partners, L.P., pursuant to Section 1.106(a)(1) of the Rules, to expedite resolution of the issues. Only Great Western has filed a petition for reconsideration of our previous decision.

[4] On October 26, 1992, Optima Cellular Partnership (Optima) and Thomas Domencich and the Committee for a Fair Lottery (collectively referred to as CFL) submitted a joint statement stating that Great Western and CFL had entered into an agreement which "called for a cessation of adverse pleadings before the Commission." Optima and CFL further state that they "take no position on the issues now pending before the Commission." Great Western's reconsideration petition is thus unopposed.

7. The final issue addressed by Great Western is whether its amendment, correcting the "clerical error of improperly listing the general partners, should be permitted." In this regard, Great Western maintains that the Commission has consistently allowed applicants to make minor amendments to their applications to correct minor errors. In support of this argument, Great Western cites the MSD decision in *Advanced Business Communications, Inc.*, 2 FCC Rcd 580, *recon. denied*, 2 FCC Rcd 3751 (Com. Car. Bur. 1987). There, the Division accepted the licensee's showing that it erroneously identified its corporate secretary as an alien in its application.

8. At the time Great Western's application was originally filed, Mary Scott Taylor and Jay F. Pritchett were both listed in the real party in interest exhibit as general partners, each with a 2.5 percent interest in the applicant. On the face of the application there was no indication that Taylor was anything other than a general partner. Thus, Great Western's application with a foreign general partner violated Section 310(b)(3) of the Act and, therefore, was defective. While we agree with Great Western that Section 310(b)(4) of the Act does not apply in this situation, because that Section involves entities which hold controlling interests in a licensee, we find Great Western's interpretation of Section 310(b)(3) incorrect. The standards contained in Section 310(b)(3) apply to situations in which an entity holds a non-controlling equity or voting interest directly in the licensee. *Wilner & Scheiner*, 103 FCC 2d 511, 521 n.45.

9. Under Section 310(b)(3), a common carrier license cannot be granted to an entity with an alien officer or director. Pritchett and Taylor were listed in Great Western's application as general partners and, as we previously found, did not form a valid limited partnership prior to filing the application. As non-insulated, non-limited partners, Pritchett and Taylor are treated as officers and directors in applying Section 310(b)(3).[5] Further, Great Western's contention that Taylor's indirect participation is through a sub-tier partnership which invokes the multiplier set forth in *Wilner & Scheiner* is mistaken. The multiplier is only used in cases where aliens are properly insulated limited partners. *Wilner & Scheiner*, 103 FCC 2d 511, 522. Great Western does not present such a case. Our cellular processing rules provide that an application will be dismissed as unacceptable for filing if it "does not comply with the Commission's rules, regulations, specific requirements for additional information or other requirements." 47 C.F.R. § 22.20(a)(2). An application that does not comply with the alien ownership provisions of the Act and our rules is unacceptable for filing and properly dismissed. 47 U.S.C. § 310(b)(3); 47 C.F.R. § 22.4(b)(3). Petitioner's argument does not support reversal of our decision affirming dismissal of petitioner's application.

10. In addition, Great Western asserts that the dismissal violated the principle of *Melody Music v. FCC*, 345 F.2d 730 (D.C. Cir. 1965) because Great Western claims it is being treated differently than other entities in the same or similar situation. Great Western argues that in a prior decision the Bureau allowed Sierra Cellular, a licensee with an alien interest, to enter into a consent decree and settle with the Commission in order to keep its construction permit. *Tellesis Partners*, 7 FCC Rcd 3169 (1992). According to Great Western, Sierra's favorable treatment cannot be reconciled with the treatment given to Great Western. Great Western also argues that the Commission continues to interpret erroneously Section 310(b)(3) of the Act. Great Western argues that Section 310(b) as written is ambiguous. It makes little sense, it claims, to literally interpret Section 310(b)3) and exclude the benefits of foreign capital infusion from the federal government. Finally, Great Western asserts that the appeal from the Commission's decision in *Continental Cellular*, 6 FCC Rcd 6834 (1991) could bear upon the outcome here if the court finds that Section 310(b)(3) of the Act does not apply to partnership interests.

11. We disagree with Great Western's argument that we have violated the principle of *Melody Music* by allowing Sierra Cellular, a licensee alleged to have alien partners, to enter into a consent decree. The facts of that case are distinguishable from the situation here. As Great Western notes, Sierra Cellular received a construction permit in 1989. An investigation into alleged rule violations was terminated with a consent decree. At all times Sierra Cellular denied the allegation that among its partners was an impermissible alien. Here, Great Western has admitted that Taylor, a British citizen, was listed in its application as a partner. Great Western has failed to demonstrate that its reliance on *Tellesis Partners* supports its argument that the Commission improperly dismissed its application. Moreover, any ambiguity that Section 310(b) creates has been clarified by our declaratory ruling in *Wilner & Scheiner*. Further, the public interest requires prompt service to the public in this market. Therefore, we will not hold in abeyance this decision until the final outcome of *Continental Cellular*.

12. Similarly, Great Western's argument that its application contained a mistake that can be corrected by minor amendment, is incorrect. Unlike the situation in *Advanced Business Communications, supra*, Great Western did not inadvertently misidentify an individual. Advanced's application was complete, but contained an erroneous statement, namely that Christine Remos was the Corporate Secretary of Advanced. In fact, Remos, a citizen of the Philippine Islands, was the office secretary. In its application, Advanced correctly stated that it had no alien officers. Thus, no material misrepresentation occurred. On the other hand, the fact that Taylor is an alien, and was known to Great Western as an alien, was required to be included in Great Western's application as initially filed. Thus, Great Western's application was defective and properly dismissed. *REM Communications*, 3 FCC Rcd 3705 (1988) (a defective application cannot be cured by amendment).[6]

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[5] Both a "partner in a partnership without limited partners and a general partner in a limited partnership have the power to manage the affairs of the company and to bind the partnership." As a result, the Commission construes the provisions of Section 310(b)(3) and 310(b)(4) relating to officers and directors to encompass these partnership interests. *Wilner & Scheiner*, 103 FCC 2d 511, 520 n.43.

[6] Moreover, Great Western's amendment did not cure the defect since P&T had not formed a valid limited partnership before the application was filed.

IV. CONCLUSION

13. In conclusion, we find that Great Western's petition for reconsideration includes arguments that could have been presented earlier in this proceeding. Moreover, we are not persuaded by any of these new contentions. Great Western's petition for reconsideration must therefore be denied.

V. ORDERING PARAGRAPH

14. Accordingly, IT IS ORDERED that the petition for reconsideration filed by Great Western Cellular Partners (File No. 10269-CL-P-492-A-88) is HEREBY DENIED and the Commission's decision affirming dismissal of the application by the Mobile Services Division IS AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
May 7, 1993

Released: May 14, 1993

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Masada, Ltd. 8310-HTS
Licensee, Radio 92080632
Station KBAC(FM)
10200 E. Girard Ave., #309A
Denver, Colorado 80231

Dear Licensee:

This letter constitutes a Notice of Apparent Liability ("NAL") for a forfeiture of twenty thousand dollars ($20.000) pursuant to Section 503(b) of the Communications Act of 1934, as amended. This action is taken under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules.

On June 10, 1991, we sent you a letter of inquiry concerning possible violations of Sections 73.1125(a), 73.1125(c), 73.3526(d), and 74.1232 of the Commission's Rules. Section 73.1125(a), the main studio rule, requires each licensee to maintain a main studio within its principal community contour and to maintain a "meaningful management and staff presence" at the main studio location. *Main Studio and Program Origination Rules (Clarification)*, 3 FCC Rcd 5024 (1988); *Jones Eastern of Outer Banks, Inc.*, 6 FCC Rcd 3615 (1991), *clarified*, 7 FCC Rcd 6800 (1992).

Section 73.1125(c) requires a licensee whose main studio is located outside its community of license to provide a local telephone number or toll-free number for residents of its community of license if community residents would otherwise incur charges in telephoning the station. Section 73.3526(d) requires a licensee to maintain public inspection files in its community of license and to make such files publicly available during regular business hours. Lastly, pursuant to Section 74.1232, a translator station whose coverage contour goes beyond the protected contour of the commercial primary station may not receive financial support from the primary station. An FM translator station, may, however receive technical assistance from the primary station to the extent of installing or repairing equipment or making adjustments to equipment to assure compliance with the terms of the translator's construction permit and license. FM translator stations in operation prior to March 1, 1991, are, however, permitted to continue to receive contributions or support from the commercial primary station for the operation and maintenance of the translator station until March 1, 1994. Thereafter, any translator will be subject to the prohibition on financial support.

In the letter of inquiry, we requested you to identify (1) the location of KBAC(FM)'s main studio, (2) the existence of staff at the location, (3) the existence of a local telephone number in KBAC(FM)'s community of license or a toll-free telephone number, (4) the location and availability of the public file, and (5) the financial agreement between you and the owner of Translator Station K288CX.

In your September 5, 1991, Response, you indicated that your primary studio has been located outside the principal community contour since October 1989 and you do not staff Station KBAC(FM)'s studio located at its transmitter site. In further letters dated November 8, 1991, August 21, 1992, September 3, 1992, and January 8, 1993, you informed us of your unsuccessful efforts to secure a main studio by sharing facilities with one of three stations. In your January 8, 1993, letter you indicated you are now negotiating with a fourth station for a main studio. As for the other allegations, you stated you have maintained a toll-free telephone number for residents of Las Vegas, NM, since August 1990. You also informed us that you located the public inspection file at the Las Vegas Public Library, which is in your community of license, and have made it available during the following business hours: (a) Tuesday-Saturday from 10:00 a.m. to 5:30 p.m.; (b) Sunday from 2:00 p.m. to 5:30 p.m.; and (c) Tuesday and Thursday evenings from 7:00 p.m. to 9:00 p.m. Lastly, you indicated that you paid the translator licensee maintenance and "consulting" fees but did not pay filing fees for FCC applications by, or for equipment or its installation for, Translator Station K288CX.

In view of the circumstances outlined above, it appears that you have been, and continue to be, in violation of Section 73.1125(a) by failing to have a main studio within your principal community contour. We find you did not violate Section 73.1125(c) because you maintain a toll-free telephone number for Las Vegas residents. Similarly, you did not violate Section 73.3526(d) because you located the public file in the community of license and made it available during regular business hours. Lastly, it appears from your submissions -- especially your contract with Carl Brasher, licensee of Translator Station K288CX -- and the paid invoices -- that K288CX was operating and that you were contributing to its upkeep and operations since before March 1, 1991. Because the rule's prohibition on translators receiving contributions from FM stations does not apply until March 1, 1994, to those translator stations operating prior to March 1, 1991, we find that you have not violated Section 74.1232.

Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, you are advised of your apparent liability for a forfeiture of twenty thousand dollars ($20,000) for your apparent willful and repeated violations of Section 73.1125(a) of the Commission's Rules from October 30, 1990, to the present. The amount specified has been reached after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934, as amended, and the guidelines described in our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *on recon.*, 7 FCC Rcd 5339 (1992), *pet. for review pending sub nom. USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992). Under these standards, ten thousand dollars ($10,000) is the base forfeiture amount for a violation of Section 73.1125(a). We increased the amount to twenty thousand ($20,000) because the violation has continued over a substantial amount of time. Therefore, we find that a forfeiture for twenty thousand dollars ($20,000) is appropriate.

In regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not be

imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. § 1.80(f)(3). Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

Additionally, as it appears you are still in violation of Section 73.1125(a), the main studio rule, you must take immediate remedial measures to relocate the main studio to within the station's principal community contour. Within thirty (30) days of the date hereof, you must provide documentation to this office outlining what steps you have taken to relocate the station's main studio. Since this is an ongoing violation, you are notified that further forfeitures may issue if the Commission is not satisfied with your progress in this area.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Pacific Bell — Transmittal No. 1607
Revisions to Tariff F.C.C. No. 128

ORDER

Adopted: May 7, 1993; **Released: May 7, 1993**

By the Associate Chief, Common Carrier Bureau:

1. On January 8, 1993, Pacific Bell filed Transmittal No. 1607 to extend the period in which Pacific Bell will waive the nonrecurring charges imposed when customers replace a number of low speed circuits with a high speed circuit. Pacific Bell calls these reconfigurations "rollover changes."[1] Pacific Bell filed an earlier rollover change promotion on August 3, 1992 in Transmittal No. 1588. Under the terms of that promotion, all orders for rollover changes were to be placed by January 31, 1993 and the changes completed by December 1, 1993. In Transmittal 1607, Pacific Bell proposes to offer a second ordering period, February 12, 1993, through June 30, 1993, while continuing to require that all changes be completed by December 1, 1993.[2] Pacific Bell's waiver of rollover change charges is limited to changes performed at the same serving wire center; no change in the point of termination is allowed. Transmittal 1607 is scheduled to take effect on May 8, 1993.

2. MFS Communications Company, Inc. (MFS) filed a petition to reject Transmittal 1607 on January 25, 1993. MFS asserts that Transmittal 1607 violates the Commission's requirement in the *Expanded Interconnection Order*, that "non-recurring reconfiguration charges must be applied in a neutral manner that does not differentiate based on whether the customer chooses to use a [competitive access provider] or [local exchange carrier] facilities for special access service unless there are specific, identifiable cost differences." MFS Petition at 1-2.[3] MFS requests that Pacific Bell also waive the nonrecurring charge imposed when a customer changes its termination point. According to MFS, imposing a charge when the termination point is changed creates an anticompetitive disincentive for access service customers to switch from Pacific Bell to a competitive access provider. *Id.* at 2-3. MFS therefore requests that Pacific Bell revise its tariff before Pacific Bell's expanded interconnection tariff takes effect. *Id.*

3. On February 4, 1993, Pacific Bell filed its reply. Pacific Bell maintains that rollover changes and changes in termination point are two distinct procedures, and that MFS is confusing these with each other. Pacific Bell Reply at 1-3. Pacific Bell argues that a rollover change requires relatively little redesign of circuits or reconstruction of engineering records, and there is no need to dispatch a technician. *Id.* at 3-4. On the other hand, it notes, a change in termination point requires a termination of service at one point and a new installation at another point. According to Pacific Bell, this requires significantly more redesigning of circuits and reconstruction of engineering records than does a rollover change. Moreover, says Pacific Bell, a change in termination point may require a technician to test the circuits. *Id.* at 5. Finally, Pacific Bell maintains that it imposes its rollover change charges and its point of termination change charges in a manner that does not discriminate against competitive access providers.[4] *Id.* at 4-5.

4. The Common Carrier Bureau has reviewed Pacific Bell's Transmittal 1607 and all associated pleadings and submissions. We conclude that no compelling argument has been presented that the tariff revisions are so patently unlawful as to require rejection.

5. Accordingly, IT IS ORDERED that the petition for rejection filed by MFS Communications Company, Inc., against Pacific Bell Tariff F.C.C. No. 128, Transmittal No. 1607, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Jill Ross Meltzer
Associate Chief
Common Carrier Bureau

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[1] Pacific Bell defines "rollover change" as rearranging a service from one port to another port in the same multiplexer, rearranging a service from one multiplexer to another in the same serving wire center, or rearranging the service from a lower speed service to a higher speed service in the same serving wire center. Pacific Bell Tariff F.C.C. 128, Section 7.4.1.(C)(3)(b), 6th revised page 305.2.

[2] Pacific Bell Transmittal 1607, Description and Justification (D&J) at 1-2.

[3] *Quoting* Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, 7 FCC Rcd 7369, 7465 (para. 203) (1992) (*Expanded Interconnection Order*).

[4] On May 6, 1993, Pacific Bell filed an application for special permission to revise Transmittal No. 1607 so that the rollover charge waiver will not be available after Pacific Bell's expanded interconnection tariff takes effect.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER

Released: May 6, 1993

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

The Rusk Corporation 8310-MD
Licensee, Radio Station KLOL(FM)
P.O. Box 1520
Houston, TX 77251-1520

Dear Licensee:

This letter constitutes a NOTICE OF APPARENT LIABILITY FOR A FORFEITURE pursuant to Section 503(b) of the Communications Act of 1934, as amended.

On September 11, 1992, the Commission asked you to respond to allegations that Radio Station KLOL(FM), Houston, TX, may have broadcast indecent language in violation of 18 U.S.C. § 1464. Specifically, it was alleged that several of KLOL's broadcasts of the "Stevens and Pruett Show" between 7 and 10 a.m. on several days in March 1991 contained indecent language. (See attached transcripts made from tapes provided by the complainants.)

Pursuant to 47 U.S.C. §§ 312(a)(6) and 503(b)(1)(D), the Commission has statutory authority to take appropriate administrative action when licensees broadcast material in violation of 18 U.S.C. § 1464, which provides criminal penalties for anyone who "utters any obscene, indecent or profane language by means of radio communication."

The Commission has defined indecency as language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs. *See Infinity Broadcasting Corporation of Pennsylvania*, 2 FCC Rcd 2705 (1987). The United States Court of Appeals for the District of Columbia Circuit has upheld the Commission's authority to restrict the broadcast of indecent material at times when there is a reasonable risk that children may be in the audience. *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988).

In your response dated November 24, 1992, you deny that the material in question is indecent, in light of changing contemporary community standards for the broadcast medium as reflected both by general industry practices -- particularly in daytime hour television programs -- and by ratings showing the popularity of the Stevens and Pruett Show in the Houston area. You assert that you used available FCC decisions to make a good faith, reasonable determination that the transcribed broadcasts, because they were clinical discussions of sexual matters with qualified experts or a discussion of a news event, did not run afoul of the indecency laws. You also argue that the sexual references in these broadcasts were mainly innuendo and double entendre for which more than one interpretation is possible,[1] and that they are less vulgar than other material the Commission has found to be indecent.

The Stevens and Pruett "sex survey call-in programs," as complainants described them, discussed, among other things, a medical procedure to enhance penis size, an alleged indecent exposure during a "Doors" concert in Miami, and oversized penises. You state that the broadcasts in question were either discussions of news events or "were intended to provide listeners with clinical information in answer to their questions." A review of the transcripts, however, does not substantiate your contention. Rather, the record of the material aired demonstrates that the "clinical" or "news" context of these programs was at most superficial, while the predominant characteristic of the programming was a pandering and titillating exchange of sexual banter about penis size and shape, sex with vegetables and baseball bats, matching sexual partners by organ size by tagging their ears, and other comments elicited by the hosts' asking such questions as, "If you could have your man enlarged, would you?" and "How big is big enough?"

Rather than being designed "to provide listeners with clinical information," these questions appear to seek vulgar and explicit descriptions of sexual organs and activities. In our opinion, they succeeded in doing so. Thus, the KLOL broadcasts are distinguishable from other indecency cases resulting in dismissals, such as *Letter to Gerald P. McAtee* (MMB, October 26, 1989), and *King Broadcasting Co.*, 5 FCC Rcd 2971 (1990). The Stevens and Pruett Show excerpts here at issue more closely resemble the broadcasts in *Pacific & Southern Company, Inc. (KSD-FM)*, 6 FCC Rcd 3692 (MMB 1990), *Independent Group Limited Partnership (WWWE(AM))*, 6 FCC Rcd 3711 (MMB 1990), and *Goodrich Broadcasting, Inc. (WVIC-FM)*, 6 FCC Rcd 2178, *aff'd*, 6 FCC Rcd 7484 (MMB 1991), all of which resulted in sanctions against the licensees.

Moreover, while you may have substituted innuendo and double entendre for more directly explicit sexual references and descriptions in some instances, unmistakable sexual references remain that render the sexual meaning of the innuendo inescapable. Thus, for example, the introductory sentence that appears in one passage "Tell me about Jim's penis" leaves no doubt as to what the reply -- "The snake is long, seven miles" -- is intended to describe. Similarly, references to "pee pee enlargement" leave no doubt that the descriptions of length and shape refer to sexual organs. Accordingly, the surrounding context of these broadcasts points to only one possible interpretation, a sexual one. Under these circumstances, a finding of indecency is clearly supported. *See Infinity Broadcasting Corp. of Pa.*, 2 FCC Rcd 2705, 2706 (1987); *Great American Television and Radio Co., Inc.*, 6 FCC Rcd 3692, 3693 (MMB 1990). Moreover, while these broadcasts may be less vulgar than some the Commission has sanctioned, this contention proves too little. In any event, the material at issue in this case is comparable to broadcasts that the Commission has determined to be indecent. *See, e.g., KFI, Inc.*, 6 FCC Rcd 3699 (MMB 1989).

[1] As discussed below, we generally reject your contention that the material cited in our letter of inquiry dated September 11, 1992, was not indecent. Upon further review, however, we agree that the passage concerning lactating or pregnant women, aired between March 11 and March 14, 1991, does not warrant further action.

You argue that the increased availability of explicitly sexual broadcasts throughout the country, as well as the high ratings enjoyed by the Stevens and Pruett Show in the Houston area, indicate that broadcasts such as the ones here at issue are acceptable daytime fare. Such availability and popularity, you argue, show that contemporary community standards for the broadcast medium have changed dramatically, so that the subject broadcasts can no longer be considered patently offensive as measured by these standards. As we stated recently in *Evergreen Media Corporation of Chicago AM*, 8 FCC Rcd 1266, 1267 (1993):

> To the extent this argument suggests that conduct that is widespread cannot be unlawful, it is plainly wrong. To the extent it implies that the popularity of a particular program or type of programming among adults undermines the classification of that material as indecent, it ignores the fact that our concern in enforcing indecency restrictions is with protecting children. [Citations omitted.]

The language in the transcribed KLOL broadcasts is lewd and vulgar and clearly falls within the definition of broadcast indecency. The excerpts contain patently offensive descriptions of sexual activities and organs, as measured by contemporary community standards for the broadcast medium. Because they aired at times of day when there was a reasonable risk that children may have been in the audience,[2] they are legally actionable. Thus, it appears that, in airing the material transcribed in the attachment during various days in March 1991, Station KLOL(FM) violated 18 U.S.C. § 1464 by broadcasting indecent programming.

Accordingly, pursuant to Section 503(b) of the Communications Act, The Rusk Corporation is hereby advised of its apparent liability for a forfeiture of thirty three thousand seven hundred fifty dollars ($33,750) for its apparent willful and repeated violations of 18 U.S.C. § 1464. The amount specified was determined by using the criteria set forth in the *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *on recon.*, 7 FCC Rcd 5339 (1992), *pet. for review pending sub nom., USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992), and the factors set forth in Section 503(b)(2) of the Communications Act of 1934, as amended. The base amount for an indecency violation is $12,500. Because the violation was repeated, and because your past compliance history includes similar violations,[3] we are increasing the forfeiture amount accordingly. *See Policy Statement, supra*, at 4700.

In regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. § 1.80(f)(3). Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

This letter was adopted by the Commission on May 3, 1993.

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

ATTACHMENT

Radio Station KLOL(FM), Houston, TX

Date/Time Broadcast: March 1991 from 7:00 to 10:00 a.m.
Material Broadcast: Stevens and Pruett Show

MV: Male Voice
M2: Second Male Voice
M3: Third Male Voice
FC: Female Caller
F2: Second Female Caller

MV: Hi.

FC: Hello.

MV: Hi, would you have, do you have breast implants?

FC: No.

MV: OK, if your, if your husband could have a manly implant that would make him more than what he is

M2: As big as you want him.

MV: would you have him have one?

FC: Yes.

MV: OK, and out of curiosity.

M2: Let's call him and tell him so.

MV: Well, that's tomorrow's feature. How long is he now?

FC: About nine.

MV: And you want more.

FC: Of course.

[2] As to your arguments that the programs in question do not reach children, we have on numerous prior occasions rejected such arguments. *See, e.g., Evergreen Media Corporation of Chicago AM*, 8 FCC Rcd 1266, 1267 (1993), and cases cited therein. "[W]hether there is a reasonable risk that children will be exposed to indecent broadcast material may be properly considered a function of the time of day during which the material is aired." *Id.*

[3] *See Rusk Corporation*, 5 FCC Rcd 6332 (MMB 1990), finding that three broadcasts of the "Stevens and Pruett Show" by KLOL(FM) in February and March 1990 were indecent. These past violations, for which the licensee paid the assessed fine, establish a pattern of apparent misconduct warranting the fine we set today.

MV: We're tracing this call and you're going to be arrested.

M2: She's not a slut.

M3: Oh.

M2: She's a glutton.

M3: Yeah. (Unintelligible)

MV: So you'd want (unintelligible), how big would you want it to be

M2: Yeah, how big?

MV: if it's already nine.

FC: At least eleven or a twelve.

M2: (Unintelligible).

MV: Oh. Is your husband a white guy?

FC: I'm sorry.

MV: Is your husband a white guy?

FC: No.

MV: I thought so.

M2: Well, that's short for a black guy. A nine, yeah.

MV: Yeah, it is.

FC: That's why I said that.

MV: Hi, have you ever had your breasts enlarged?

F2: No.

MV: Are you thinking about it?

F2: Well, I don't know. I don't know. It could be a viable possibility at some point but right now it's (Unintelligible).

MV: What is your opinion of breast enlargement, women who do.

F2: Do what?

MV: What is your opinion of it? How do you feel about that?

F2: Oh, I don't know, I've had some, some relatives and stuff have had it done and I suppose if it makes you feel more comfortable, why not, you know?

MV: So if pee pee enlargement becomes popular like breast enhancement would you or would you not want your husband to get one?

F2: No.

MV: Why not?

F2: No, well see everybody is talking about size and everything but, you all the time would get you bored, right?

M2: Yeah.

FC: Right.

MV: And so, I don't know whether you did, what two things are you talking about? And remember, we're on the radio.

FC: Oh, man.

MV: You can't say it?

FC: Oh, well, it would be like, you know, you have one and then you use something else.

MV: Ah. Oh, yeah, yeah, yeah.

M2: Now if you're Presbyterian or Episcopal it's OK.

FC: (Laughs).

MV: Yeah, that's right.

M2: Yeah, it was in the paper.

MV: Yeah, 'cause they just said the other day that premarital wild sex is fine. I'm going to become a, you know, I was thinking about Jewish.

FC: (Unintelligible)

MV: I was thinking seriously about Jewish, but I think Presbyterian or Episcopal. So, uh, now, what was the other thing. We know the, 'cause, you know, we, uh. OK, what was the other thing? The alien object.

FC: Oh well.

MV: Yeah, what was that? Was it animal, vegetable or mineral.

FC: Well, I, well I, I got, I got, gee. I got one vegetable and then I got something el, I got, uh.

MV: Plastic.

FC: A baseball bat, put it that way.

MV: A baseball bat. Hock-eem(?) (Laughter) (Sound of spitting) Good Lord. M3: With or without pine tar. I gotta know. I gotta know.

MV: Oh you bitch. Oh, oh, I'm sorry. I didn't mean that. No, (unintelligible) is what I meant to say.

M2: He doesn't mean that.

FC: OK

MV: You sleaze.

* * *

Radio Station KLOL(FM), Houston, TX

Date/Time Broadcast: March 14 to 21, 1991, at 7:00 to 10:00 a.m.

Material Broadcast: Stevens and Pruett Show

MV: Male Voice

M2: Second Male Voice

RM: Ray Manzarek (of the rock group "The Doors")

MV: Now do you think that's a good thing Ray that this new movie is turning new people onto the Doors?

RM: Well, I think that's a good thing, yeah, that you know if, if young, if young people are getting onto the Doors finally, maybe it'll make them, you know, slightly, it'll open the doors of perception in their minds.

* * *

M2: So, Val, Val Kilmer. Yoy know one thing that bothers me. He put his finger through his pants. Now, big question we want to know.

RM: What is that, man.

MV: Did Jim whip it out in Florida or no.

RM: That's an important thing to know because I'm very concerned about Jim's pee pee dicky. How about you guys?

MV: Yeah, yeah, we want to know if his pee pee dicky came out.

RM: I don't like to be asked questions by men about Jim's penis.

M2: Wait a minute. Wait a minute.

MV: It's in the act. It's not, well.

RM: Tell me about Jim's penis.

MV: Ray.

RM: You know I never had anything to do with it.

MV: Ray.

RM: I'm not concerned with Jim's penis.

MV: Ray, Ray, listen. (Unintelligible)

M2: Ray, it's sounding like a fixation.

RM: It never came out, it didn't come, whether it stood up or it fell down. I, who cares?

MV: Well, wait a minute.

M2: I do, damn it.

MV: Now just a minute.

RM: The snake is long, seven miles. (Unintelligible)

MV: Ray, Ray I know he can't hear us. Ray listen, it wasn't our idea to ask that question. We have a couple of babes in here that wanted to know.

M2: You know, for the historical.

RM: Well, we're having a tough time here on this end man, I'm losing you guys.

MV: Oh.

RM: But, I'll tell you what. If you can hear me.

MV: Yeah, we can hear you good.

RM: I think that, uh, the Miami incident. I'll tell you what happened in Miami.

MV: OK.

RM: It's, it's, it was a mass hypnosis in which I don't think Jim ever actually pulled it out. I never saw it. And a lot of people claimed they did but there are also a lot of people who claimed to have seen the Virgin Mary in Lourdes, too.

MV: (Laughter)

RM: Religious hallucinations.

MV: Yeah. Are you saying.

RM: You know, I don't think it really happened because had it happened you couldn't have missed the thing you know. When, there would have been no doubt. My God look at that thing. It's come out. Holy cow, put that thing away Morrison.

MV: So you're saying that Jim's dicky thing is religious?

* * *

Radio Station KLOL(FM), Houston, TX

Date/Time Broadcast: March 25, 1991, between 9:00 and 10:00 a.m.

Material Broadcast: Stevens and Pruett Show

MV: Male Voice

M2: Second Male Voice

M3: Third Male Voice

DR: Doctor

FC: Female Caller

MV: Question? Go ahead.

FC: No, we just had a statement.

M2: Oh.

MV: A statement for doctor?

M2: A statement about what?

FC: Well, we were listening to you-all about size and.

MV: Oh the doctor was talking about size.

M2: The man complained earlier that he was so large that it was ruining his marriages.

FC: Yeah. Well, (Unintelligible) likes it big. But anyway we were just saying that big is good if the guy knows how to use it.

M2: Who's we?

FC: Huh?

M2: Who's we?

M3: She and her hand.

FC: Right.

DR: Well, no, actually we, we've actually been talking about getting a service together for people who are mismatched. And if you actually are of those people who think that is so, well, then, maybe you should get together with that guy that loused up his four marriages.

M2: She is so big she could handle anything. I mean.

FC: (Laughs).

MV: Is that what you're saying?

M2: Is that what you're saying

FC: I, I'm saying that if a guy knows how to use his thing right.

MV: Well the doctor is saying, that on record, and judging from his hand measurements some of these guys, a very few of them, a hand full (Laughs)

M3: Ahh.

MV: are like.

M2: Two hands full.

MV: Twelve inches, about the size of a beer can in diameter. So, now could you handle something like that? I mean, and he says it's actually ruined marriages.

DR: Sure can.

MV: And I can understand why.

DR: But there are some women who can do that without any problem. It's just a question of matching the right people with the right people. I mean I think that is great for you and your friends.

FC: Well (Unintelligible)

DR: I mean I don't know how you and your group of friends have come to this idea that you're all similar in that manner.

M2: A big organ for a big cathedral I say doctor.

MV: Just like, you know there are, for a catcher's mitt there are softball ones and there are hardball ones.

M2: Hardballs, yeah.

MV: So, are you the size of a softball? I mean I hate to be laughing.

M2: I don't think we ought to talk about her size. It's obvious what.

MV: I think the service, the idea of the service for the Doc matching size.

M2: Finding somebody big for somebody big.

MV: Yes.

DR: I mean they have dating services and stuff like that, I don't know, you know.

MV: Boy, you know how we did the swingers dating service.

FC: Well, somebody big is just going to have to find somebody that, that'll get (unintelligible).

MV: That's big.

DR: OK. So let's, let's take this a little bit further, OK? Now, how are you going to just walk down the street and find out, I mean how's an average guy who has this problem going to find you? I mean are you going to have a sign around your neck?

M2: (Unintelligible), you as a gynecologist, do you have.

MV: I think we ought to have her tagged. Have her ears tagged so if you're a big guy and you're in a bar, you know she is.

MV: Like that old farm saying, why buy milk when you have the cow at home?

DR: This is not the kind of thing that you can just advertise.

MV: Thank you very much.

M2: Thank you. I think you've created a new feature for the show Doc.

MV: Yeah.

M2: Do you have a device that, an instrument that measures.

MV: Come in and see Doctor Rob.

DR: It's called a tape measure.

MV: Come in and see Doctor Rob and he'll tag your ear.

* * *

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 93-61

In the Matter of

Amendment of Part 90 of the Commission's Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems	RM-8013

ERRATUM

Released: May 5, 1993

By the Chief, Private Radio Bureau:

1. On April 9, 1993, the Commission released a *Notice of Proposed Rule Making* (*Notice*), FCC 93-141, 58 Fed. Reg. 21276 (April 20, 1993), proposing to amend Part 90 of the Rules to adopt regulations for automatic vehicle monitoring systems. This *Erratum* corrects the caption and text of the *Notice* and adds several parties to the list in Appendix A of parties filing late-filed comments.

2. The caption of the *Notice* is corrected by deleting the number 16 from the title of the proceeding. The title correctly reads: "Amendment of Part 90 of the Commission's Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems."

3. The last sentence of paragraph 24 in the text of the *Notice* is corrected to read as follows: "If not, commenters should offer potential solutions, short of removing Part 15 users and amateur operations from the band, restricting where such users could operate in the band, or placing stricter limitations on the operation of such users in this band."

4. Appendix A of the *Notice* is amended by adding the following parties to the list of parties filing late-filed comments: the New Jersey Expressway Authority, the New Jersey Highway Authority, the New Jersey Turnpike Authority, the New York State Thruway Authority, the Pennsylvania Turnpike Commission, the Port Authority of New York and New Jersey, and the Triborough Bridge and Tunnel Authority; the International Bridge, Tunnel and Turnpike Association; and the Transportation Corridor Agencies.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: May 5, 1993

COMMENTS INVITED ON MINNESOTA PUBLIC SAFETY PLAN

The Commission has received the public safety radio communications plan for Minnesota (Region 22).

In accordance with the Commission's Memorandum Opinion and Order in General Docket 87-112, Region 22 consists of the state of Minnesota. (General Docket No. 87-112, 3 FCC Rcd 2113 (1988)).

In accordance with the Commission's Report and Order in General Docket No. 87-112 implementing the Public Safety National Plan, interested parties may file comments on or before **June 14, 1993** and reply comments on or before **June 29, 1993.** (See Report and Order, General Docket No. 87-112, 3 FCC Rcd 905 (1987), at paragraph 54.)

Commenters should send an original and five copies of comments to the Secretary, Federal Communications Commission, Washington, D.C. 20554 and should clearly identify them as submissions to **PR Docket 93-130 Minnesota-Public Safety Region 22.**

Questions regarding this public notice may be directed to Betty Woolford, Private Radio Bureau, (202) 632-6497 or Ray LaForge, Office of Engineering and Technology, (202) 653-8112.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: May 5, 1993

COMMENTS INVITED ON MISSOURI PUBLIC SAFETY PLAN

The Commission has received the public safety radio communications plan for Missouri (Region 24).

In accordance with the Commission's Memorandum Opinion and Order in General Docket 87-112, Region 24 consists of the state of Missouri. (General Docket No. 87-112, 3 FCC Rcd 2113 (1988)).

In accordance with the Commission's Report and Order in General Docket No. 87-112 implementing the Public Safety National Plan, interested parties may file comments on or before **June 14, 1993** and reply comments on or before **June 29, 1993.** (See Report and Order, General Docket No. 87-112, 3 FCC Rcd 905 (1987), at paragraph 54.)

Commenters should send an original and five copies of comments to the Secretary, Federal Communications Commission, Washington, D.C. 20554 and should clearly identify them as submissions to **PR Docket 93-131 Missouri-Public Safety Region 24.**

Questions regarding this public notice may be directed to Betty Woolford, Private Radio Bureau, (202) 632-6497 or Ray LaForge, Office of Engineering and Technology, (202) 653-8112.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: May 5, 1993

COMMENTS INVITED ON KENTUCKY PUBLIC SAFETY PLAN

The Commission has received the public safety radio communications plan for Kentucky (Region 17).

In accordance with the Commission's Memorandum Opinion and Order in General Docket 87-112, Region 17 consists of the state of Kentucky. (General Docket No. 87-112, 3 FCC Rcd 2113 (1988)).

In accordance with the Commission's Report and Order in General Docket No. 87-112 implementing the Public Safety National Plan, interested parties may file comments on or before **June 14, 1993** and reply comments on or before **June 29, 1993.** (See Report and Order, General Docket No. 87-112, 3 FCC Rcd 905 (1987), at paragraph 54.)

Commenters should send an original and five copies of comments to the Secretary, Federal Communications Commission, Washington, D.C. 20554 and should clearly identify them as submissions to **PR Docket 93-132 Kentucky-Public Safety Region 17.**

Questions regarding this public notice may be directed to Betty Woolford, Private Radio Bureau, (202) 632-6497 or Ray LaForge, Office of Engineering and Technology, (202) 653-8112.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-323

In re Applications of

HS COMMUNICATIONS, INC.	File No. BPH-880505MZ
STACY C. BRODY	File No. BPH-880505NO
PAMELA R. JONES	File No. BPH-880505NR
CRAIG L. SIEBERT	File No. BPH-880505PM

For Construction Permit for
New FM Station, Channel 271A,
Virginia Beach, Virginia

MEMORANDUM OPINION AND ORDER

Adopted: April 28, 1993; Released: May 13, 1993

By the Commission:

1. Before the Commission are Applications for Review of a Review Board decision, 7 FCC Rcd 6448 (Rev. Bd. 1992), filed on November 6, 1992 by Craig L. Siebert (Siebert) and HS Communications, Inc. (HS). In that decision the Review Board upheld a decision of Administrative Law Judge Edward J. Kuhlmann (ALJ)[1] which denied all integration credit to Siebert and to HS, awarded 100% integration credit to another applicant, Stacy C. Brody (Brody), and awarded the construction permit in this proceeding to Brody as the comparatively superior applicant.[2] The ALJ's decision also denied a post-hearing motion of HS to reopen the record and add financial qualifications issues and a real-party-in-interest issue against Brody and a motion of Siebert to reopen the record to take official notice of the fact that, subsequent to the hearing, Siebert divested himself of his interest in Cell Ventures Limited.

2. After reviewing the pleadings and record, we agree with the Review Board's disposition of this case, with one exception. Specifically, we conclude that the Board erred in upholding the ALJ's decision to deny HS all integration credit and that HS should have instead received 30% integration credit.[3] This error has no impact on the final outcome of the case, however, since Brody is still the superior applicant in light of the award to her of 100% integration credit.

3. ACCORDINGLY, IT IS ORDERED, That, pursuant to 47 C.F.R. § 1.115(g), the Applications for Review filed November 6, 1992 by HS Communications, Inc. and by Craig L. Siebert ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[1] 7 FCC Rcd 1309 (ALJ 1992).

[2] On November 23, 1992, HS filed an Opposition to Siebert's Application for Review and Brody filed a Consolidated Opposition to the Applications for Review of HS and Siebert. Another applicant in this proceeding, Pamela R. Jones, did not ask for review of the Review Board's decision, which denied Jones' application along with the applications of HS and Siebert. The denial of Jones' application is therefore final.

[3] Citing *Royce International Broadcasting*, 5 FCC Rcd 7063 (1990) (subsequent history omitted), the Board denied HS all integration credit on the grounds that HS' sole owners, Mr. and Mrs. Chawla, would not exercise managerial authority in the manner claimed. However, Royce is not controlling in cases that do not present "far-reaching questions about where control of [the] applicant lies," *i.e.*, questions as to whether someone other than the voting owners will be in a position to control the applicant. *Royce* at 7064 ¶10; *see also Charisma Broadcasting Corporation*, 8 FCC Rcd 864, 867 ¶ ¶ 16-20 (1993) (applicant denied all integration credit because of significant involvement of non-owner). Here, no such far-reaching questions exist because HS does not have a two-tiered ownership structure and there is no indication of any involvement by individuals who do not have an ownership interest. Thus, while we agree with the Board that Mrs. Chawla's lack of managerial responsibility, as exemplified by her ignorance of key aspects of HS' proposal, requires rejection of her claimed 70% integration credit, it does not follow that HS should be denied any credit. Based on Mr. Chawla's 30% voting interest and his active role to date, his proposal to be involved in the day-to-day management and operation of the station is credible, and HS should have received credit for his 30% integration pledge. *Compare Progressive Communications, Inc.*, 5 FCC Rcd 7063 (1991) (subsequent history omitted) (applying *Royce* to deny all integration credit in circumstances where a husband with no ownership interest in an applicant was significantly involved in virtually all aspects of its affairs, leaving in question the extent to which the claimed owners, including his wife, would themselves exercise control).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

ROBERT J. RANALLI File No. EID-689

For authority under Section 212 of the Communications Act of 1934, as amended, to hold the position of officer or director of more than one carrier subject to the Act

ORDER

Adopted: May 6, 1993; Released: May 13, 1993

By the Deputy Chief (Operations), Enforcement Division, Common Carrier Bureau:

1. We have for consideration an application filed by Robert J. Ranalli on March 4, 1993, for authorization under Section 212 of the Communications Act of 1934, as amended, 47 U.S.C. §212, and Sections 1.762 and 62.1 of the Commission's Rules, 47 C.F.R. §§1.762 and 62.1, to serve as an officer and director of both American Telephone and Telegraph Company (AT&T) and McCaw Cellular Communications, Inc. (McCaw).[1] The application was placed on public notice March 26, 1993, 8 FCC Rcd _____, and no oppositions have been filed.

2. According to Mr. Ranalli, he currently serves as President, Consumer Services of AT&T. He is responsible for AT&T's residential communications services, credit card services, personal communications services, and new business development for consumer services.[2] He seeks authority to serve as a director of McCaw, a carrier engaged principally in the business of providing domestic public cellular radio telecommunications services. Mr. Ranalli states that he does not serve as an officer or director of any other carrier and does not have a financial interest in any common carrier other than AT&T, in which he holds both shares of common stock and stock options.[3]

3. Mr. Ranalli states that AT&T's right to appoint one of McCaw's sixteen directors is proportionately in line with its equity stake in McCaw and confers little ability to unduly influence McCaw because its representation is quite small.[4] Mr. Ranalli further states that AT&T's influence will be even less than the numbers might suggest because twelve of the remaining directors are currently designated by one person, Craig O. McCaw, whose family has voting control of McCaw.[5] Under these circumstances, Mr. Ranalli contends that the proposed appointment will neither diminish the independence of either carrier nor cause injury to the shareholders of either carrier or the public interest because AT&T and McCaw do not currently compete to any significant degree.[6]

4. Section 212 of the Act prohibits persons from holding the position of officer or director of more than one carrier subject to the Act unless authorized by the Commission upon a showing that neither the public nor private interests will be adversely affected by the interlock. In determining whether public or private interests will be adversely affected, the Bureau considers a number of different factors, including, but not limited to, the potential for anticompetitive conduct, a possible diminution in the independence of each carrier involved, and the possibility of conflicts of interest on the part of common directors or officers in violation of the fiduciary duties imposed upon persons occupying those positions. *See In re Application of James A. Dwyer,* DA 87-852 (Com. Car. Bur., July 16, 1987) *citing In re Application of Walter S. Gifford,* 2 FCC 741 (1935).

5. After due consideration of the facts and circumstances presented by this application, we find that Mr. Ranalli has made a satisfactory showing as required by law that public and private interests will not be adversely affected by a grant of the requested authorization.

6. IT IS THEREFORE ORDERED, pursuant to Sections 4(i) and 212 of the Communications Act, 47 U.S.C. §§ 154(i) and 212, and the authority delegated under Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the application of Robert J. Ranalli for authorization to serve as an officer and director of both AT&T and McCaw, EID-689, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief, (Operations)
Enforcement Division
Common Carrier Bureau

[1] On September 14, 1992, AT&T tendered an offer to McCaw to purchase approximately 7.2% of its Class A Common Stock. McCaw accepted the tender offer. This offer also gave AT&T the right to appoint one representative to McCaw's board of directors. Mr. Ranalli is AT&T's nominee for that position.

[2] Application at p. 2.
[3] *Id* at p. 3.
[4] *Id* at p. 5.
[5] *Id* at p. 5.
[6] *Id* at p. 6.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

Certain Broadcast Stations
Serving Communities in the
State of Louisiana

MEMORANDUM OPINION AND ORDER AND NOTICE OF FORFEITURE

Adopted: April 30, 1993; Released: May 13, 1993

By the Commission:

I. INTRODUCTION

1. The Commission has before it for consideration: (i) a Petition for Reconsideration filed jointly on March 1, 1992, by the Louisiana Consumers League (LCL) and the Louisiana State Conference of Branches of the NAACP and its respective branches (NAACP) of our Memorandum Opinion and Order (*Order*), *Applications of Certain Broadcast Stations Serving Communities in the State of Louisiana*, 7 FCC Rcd 1503 (1992)(*Order*); (ii) a Petition for Reconsideration filed on March 2, 1992, by AmCom of Louisiana, Inc. (AmCom), licensee of KRMD/KRMD-FM; (iii) a Petition to Withdraw filed by LCL as well as a settlement agreement[1] filed jointly on May 13, 1992, by LCL and AmCom; and (iv) a Joint Request for Approval of Settlement Agreement[2] filed on May 15, 1992, by NAACP and AmCom. In the *Order*, the Commission concluded that the licensee's failure to comply with the Commission's EEO Rule warranted renewal for less than a full term subject to reporting conditions and Notice of Apparent Liability in the amount of $20,000. *See* 47 C.F.R. Section 73.2080. The licensee requests reconsideration of the *Order*, renewal of the licenses for a full term and elimination of the forfeiture. The licensee states that reporting conditions alone are the appropriate sanction based on its EEO record. For the reasons noted herein, we are unconvinced that reconsideration is justified for the licensee. Therefore, the *Order* is affirmed. Further, by this *Order*, we issue a Notice of Forfeiture for $20,000 against AmCom of Louisiana, Inc. for violation of our EEO Rule.

II. DISCUSSION

2. Reconsideration is appropriate where the petitioner shows either a material error or omission or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters. *See WWIZ, Inc.* 37 FCC 685, 686 (1964), *aff'd sub. nom. Lorain Journal Co. v. FCC* 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966); 47 C.F.R. Section 1.106(c).

3. In the *Order*, we found that the licensee: 1) hired 34 overall, including 33 upper-level, employees from January 1986 to June 1989; 2) identified only three minority referrals from newspapers; 3) kept inadequate applicant flow records; 4) had no records to indicate which sources were contacted for which jobs; 5) neglected to self-assess its program until six months before renewal; and 6) hired no minorities among its 34 overall hires despite its location in a MSA with a labor force of 30.6% minorities. Accordingly, the Commission imposed reporting conditions, issued a Notice of Apparent Liability for $20,000 and renewed the licenses for a short term.

4. AmCom's main contention on reconsideration is that its record, when properly compared with similar stations, is not egregious enough to warrant the sanctions imposed. AmCom maintains that the Commission erred in imposing the sanctions because it mischaracterized AmCom's record, ignored the stations' minority applicants in its evaluation of AmCom's recruitment efforts, and, improperly found AmCom's efforts similar to more egregious records[3] rather than to those receiving lesser sanctions.[4]

5. First, AmCom alleges that "[c]ontrary to the FCC's decision ... which stated that the NAACP was the only minority-specific organization the licensee contacted for available positions during the period January 1986 through June 1, 1989, the licensee maintained contact with a number of other minority sources including Southern University and Shreveport Vo-Tech, both with large minority enrollments ... and with the 18 minority-specific sources listed ...." We acknowledge that Southern University at Shreveport is an historically Black university and should have been considered as a minority source. However, petitioner has failed to establish that the record contains sufficient information to conclude that Shreveport Vo-Tech should have been considered a minority source. Nor is it apparent how the licensee's specific vacancies correlate to training at the subject vocational school. Nevertheless, even if the Commission had considered these schools minority specific sources, our conclusion regarding the licensee's recruitment would be unchanged given its overall EEO deficiencies. Further, although the *Order* did not specifically acknowledge 18 minority specific sources, it did men-

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[1] The settlement agreement between AmCom and LCL was reviewed and approved. Accordingly, LCL's petition for reconsideration has been dismissed. *See In the Matter of Applications of AmCom of Louisiana, Inc. for Renewal of the Licenses for Station KRMD and KRMD-FM, Shreveport, Louisiana*, 8 FCC Rcd 75 (1992).

[2] We have reviewed the settlement agreement pursuant to *Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, Competing Applicants, and Other Participants to the Comparative Renewal Process and to the Prevention of Abuses in the Renewal Process*, 4 FCC Rcd 4780 (1989), *recon. granted in part*, 5 FCC Rcd 4780 (1989), *recon. granted in part*, 5 FCC Rcd 3902 (1990). We find that the agreement generally complies with the Commission's rules and policies, and, therefore, NAACP's petition for reconsideration is dismissed.

[3] *See Station WTHZ-FM*, 5 FCC Rcd 7695 (1990)(station received reporting conditions, renewal for a short term and an $18,000 forfeiture); *station WXBM*, 6 FCC Rcd 7356 (1991)(station received reporting conditions, renewal for a short term and a $20,000 forfeiture); and *station WWOC-FM*, 7 FCC Rcd 1815 (1992)(station received reporting conditions and a $20,000 forfeiture).

[4] *See Stations WZRX(AM)/WSTZ-FM*, 7 FCC Rcd 1420 (1992)(station received reporting conditions); *station WSPD/WLQR-FM*, 7 FCC Rcd 669 (1992)(station received reporting conditions).

tion that the licensee's sources were expanded and that an EEO Director was hired after August 1988. We found that approximately 16 minority sources were added 10 months before the end of the license term. Only five of the licensee's 34 full-time positions remained to be filled when the additional sources were added. Moreover, it is not clear from the record that the additional 16 sources were used even for these five positions. In fact, the record does not establish, nor has petitioner shown on reconsideration, that these sources were used for any of the remaining positions.

6. Second, AmCom correctly notes that the *Order* did not mention the 14 minority applicants reported in its opposition to the petition to deny. We did not consider these applicants for several reasons. First, the licensee did not submit any documentation to support its statements regarding these applicants. None of the licensee's submissions specified when the minorities applied for positions. In fact, there was no documentation concerning any positions that the 14 minority applicants applied for, nor was any identification of the 14 minority applicants provided by race or national origin. Moreover, it appears that no such minority applicants were considered for the 34 full-time jobs. For example, in the referenced opposition pleading, the licensee stated that minority "applications are not reflected [in the inquiry response data] because they did not respond to particular job openings." The licensee's statement appears to suggest that minority applications on file were not reviewed because those applications were not associated with any vacancy.[5]

7. The licensee previously asserted financial difficulties as a mitigating factor regarding its EEO performance. It does so again in its petition for reconsideration. However, upon reconsideration, the licensee fails to show error in the Commission's *Order* or present evidence not heretofore before the Commission with regard to the above allegations.

8. Lastly, we find without merit the licensee's allegation that its record is distinguishable from stations receiving similar sanctions, specifically, WTHZ-FM.[6] The licensee fails to present any error in the Commission's analysis or facts previously unknown. The licensee states that WTHZ-FM received an $18,000 forfeiture, a short-term renewal and reporting conditions because of "the licensee's failure to utilize any recruitment sources except one -- 'Radio & Records' or to hire any minorities, except one, an Hispanic, who was not a member of the local dominant minority group (African-American). On the other hand [states the licensee], unlike these licensees, AmCom utilized a large number of recruitment sources (12 at the beginning and 29 by the end of its license term), attracted minorities to its applicant pool throughout its license term and improved its outreach efforts prior to the filing of its renewal applications." However, none of the licensee's submissions -- renewal applications, opposition to the petition, or inquiry response -- show that it attracted a meaningful number of minority applicants for its 34 full-time jobs from its use of general sources. Moreover, there is no record evidence that the aforementioned minority sources were contacted for specific vacancies as they occurred. Under these circumstances, the licensee of KRMD/KRMD-FM is entitled to little, if any, credit for its contact with general recruitment sources. Such treatment is consistent with established Commission policy. *See Applications of Certain Broadcast Stations Serving Communities in the State of South Carolina*, 5 FCC Rcd 1704, 1709 n.8 (1990). Further, the licensee's statement, that it attracted minorities to its applicant pool throughout its license term, is not supported by the record before us. The *Order* noted that the record of KRMD/KRMD-FM was similar to but more egregious than that of WTHZ-FM because, while both exhibited deficiencies (ineffective use of recruitment sources, inadequate records, lack of self-assessment until late in their terms, and similar sized minority labor forces), the licensee of KRMD/KRMD-FM had more vacancies for which it failed to recruit and track its efforts.

9. We also reject as without merit the licensee's assertion that the facts of its case warrant only reporting conditions based on comparison with WZRX/WSTZ-FM and WSPD/WLQR-FM. When evaluating a station's EEO efforts, the Commission considers the totality of the circumstances.[7] In this regard, AmCom's EEO efforts and that of Stations WZRX/WSTZ-FM and WSPD/WLQR-FM differed significantly, thus warranting different sanctions and remedies. The EEO programs of the licensee of WZRX/WSTZ-FM and WSPD/WLQR-FM, unlike the EEO program of the licensee of KRMD/KRMD-FM, were effective in identifying more sources, eliciting more minority referrals, interviewing more minorities and hiring more minorities.

III. CONCLUSION

10. We note that the factors which the Commission takes into account when determining the amount of a forfeiture penalty include the nature, circumstances, extent and gravity of the culpability, any history of prior offenses, ability to pay and such other factors as justice may require. 47 C.F.R. Section 1.80(b)(4). Having considered these factors, taking into account the arguments presented by the licensee's petition, as previously addressed, we find the original *Order* which granted renewal for a short term, imposed reporting conditions and issued a NAL for $20,000 is appropriate.

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[5] Further, the licensee represents that its minority applicants were not hired because it chose to promote from within.

[6] The licensee also argues that it wrongly received sanctions similar to those in Stations WXBM-FM and WWOC-FM. The *Order* did not discuss either case relative to KRMD/KRMD-FM. However, the records in those cases are dissimilar. WXBM-FM was designated for hearing. WWOC-FM was decided based on an increase in the Commission's forfeiture authority which affected licenses in renewal groups which expired after the licenses in Louisiana. *See Forfeiture Policy Statement*, 6 FCC Rcd 4695 (1991), *modified in part*, 7 FCC Rcd 5339 (1992), *pets. for review, pending sub. nom., USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992).

[7] As the Commission stated in *License Renewal Aplication of Congaree Broadcasters, Inc. for Station WSCQ-FM, West Columbia, South Carolina*, 5 FCC Rcd 7691 (1990), factors that we consider in our analysis on a licensee's efforts "include, but are not limited to, the EEO renewal program, the number of full-time hiring opportunities and the efforts made to fill those vacancies, documentation of those efforts, the licensee's assessment of those efforts, the length of the licensee's tenure and the employment profile during the license term." *Id.* at 7692, n.6. *See License Renewal Application of Eastern Carolina Broadcasting Company, Inc. Former Licensee of Stations WGBR(AM)/WKTC(FM) Goldsboro, North Carolina*, 6 FCC Rcd 6154 (1991).

IV. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED, that the Petition for Reconsideration filed jointly by LCL and the Louisiana State Conference of Branches of the NAACP and its respective branches IS DISMISSED.

12. IT IS FURTHER ORDERED that the Joint Request for Approval of Settlement Agreement filed by NAACP and AmCom IS GRANTED.

13. IT IS FURTHER ORDERED that the Petition for Reconsideration filed by AmCom of Louisiana, Inc. IS DENIED and, pursuant to Section 503(b), that AmCom of Louisiana, Inc. FORFEIT to the United States the sum of twenty thousand dollars ($20,000) for the wilful and repeated violation of Section 73.2080 of the Commission's rules, 47 C.F.R. 73.2080. Payment of the forfeiture may be made by mailing to the Commission a check or different instrument payable to the Federal Communications Commission. In regard to this forfeiture proceeding, the licensee may take any of the actions set forth in Section 1.80 of the Commission's rules and Section 504(a) of the Communications Act of 1934, as amended, as summarized in the attachment to this Order.

14. IT IS FURTHER ORDERED tht the Mass Media Bureau send by Certified Mail -- Return Receipt Requested -- one copy of this Memorandum Opinion and Order to all parties.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 93-129

In the Matter of

the Bell Operating Companies' Tariff for the 800 Service Management System, Tariff F.C.C. No. 1 — Transmittal No. 1

and

800 Data Base Access Tariffs

ORDER

Adopted: April 27, 1993; Released: April 28, 1993

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. The Commission recently required that all local exchange companies (LECs) file access tariffs implementing a new rate structure for 800 access service. The change in rate structure resulted from the LECs' conversion to a new technology for delivering 800 services, namely, 800 data base service. The Commission, in CC Docket No. 86-10, conducted a rule making regarding 800 data base services in which it prescribed a rate structure and filing dates for data base 800 access service tariffs, and required the tariffing of the Service Management System (SMS/800) to support providing 800 services.[1] The SMS/800 is a centralized data base through which the customer records and routing instructions for each 800 telephone number are entered and updated and 800 numbers are reserved. The carriers listed in Appendices A, B and C filed tariffs to comply with the requirements that the Commission established in CC Docket No. 86-10.

2. By this Order, we are advancing the effective date for the SMS/800 tariff and the LEC data base query tariffs, as listed in Appendices A, B and C, suspending them for one day, imposing an accounting order and initiating an investigation with issues to be designated in a subsequent order. Also, we are ordering some of the price cap LECs to recalculate their PCIs to reflect the revisions in their exogenous costs which are discussed in this Order.

II. BACKGROUND

3. The 800 data base system, as the LECs have chosen to deploy it, uses the LECs' signalling system 7 network which carries signalling for a variety of communications services, including 800 traffic. That signalling network interacts with several regional databases, called Service Control Points (SCPs), which will contain customer records and routing instructions for each 800 number. When an 800 call is placed, it is held at the Service Switching Point (SSP)[2] until a query can be sent to, and routing instructions received from, the SCP.[3] The routing instructions tell the SSP which IXC to send the call to and the IXC can then, in turn, route the call to the 800 service subscriber.[4] This carrier identification is the basic level of service in 800 data base. LECs also offer "vertical services" which enable customers to vary the routing and destination of 800 calls.

4. The other major component of the 800 data base system is the Service Management System for 800 services (SMS/800). It is a central data base in which all of the customer records for 800 numbers are maintained. The SMS/800 is interconnected to the SCPs and periodically updates the data in the SCPs by downloading current customer records to each of the regional SCPs. Only specified entities, called Responsible Organizations (RESPORGs), are allowed to access the SMS/800 to make such changes. For each 800 number, there is only one RESPORG.

5. Local exchange carriers (LECs) filed three types of tariffs relating to the provision of 800 data base management services. First, the Bell Operating Companies (BOCs) jointly filed a single tariff to provide the SMS services used by RESPORGs. Specifically, Ameritech Operating Companies (Ameritech), The Bell Atlantic Telephone Companies (Bell Atlantic), BellSouth Telecommunications, Inc. (BellSouth), Nevada Bell (Nevada Bell), The NYNEX Telephone Companies (NYNEX), Pacific Bell (Pacific), Southwestern Bell Telephone Company (Southwestern) and US West Communications, Inc. (US West), jointly filed a tariff as the Bell Operating Companies (BOCs) on March 5, 1993, to provide functions and support services through the SMS/800. *See* Bell Operating Companies' Tariff for the

[1] Provision of Access for 800 Service, CC Docket No. 86-10, Notice of Proposed Rule Making, 102 FCC 2d 1387 (1986); Supplemental Notice of Proposed Rule Making, 3 FCC Rcd 721 (1988); Report and Order, 4 FCC Rcd 2824 (1989); Memorandum Opinion and Order on Reconsideration and Second Supplemental Notice of Proposed Rule Making, 6 FCC Rcd 5421 (1991); Order, 7 FCC Rcd 8616 (1992); Second Report and Order, 8 FCC Rcd 907 (1993) (*Rate Structure Order);* Memorandum Opinion and Order on Further Reconsideration, 8 FCC Rcd 1038 (1993); Order, 8 FCC Rcd 1423 (1993); Order, DA 93-294 (March 11, 1993).

[2] An SSP is located at either an end office or a tandem switch. It holds an 800 call, initiates a query and routes the call when instructions are received from the SCP.

[3] The SCPs are also currently used to provide another database service, Line Information Data Base (LIDB) and may be used to provide other services in the future.

[4] The 800 data base system is far more flexible than the NXX system it is replacing. Under NXX, all of the 800 numbers for a particular NXX were assigned to the same IXC and if an 800 subscriber wanted to change carriers, it had to change 800 numbers. Under the 800 data base system, 800 number numbers within the same NXX can be assigned to different carriers, and traffic to an 800 number can be switched from one carrier to another or divided among several carriers by time of day or other allocation factors.

800 Service Management System, Tariff F.C.C. No. 1, Transmittal No. 1 (SMS/800 tariff). This tariff is filed pursuant to Commission order and establishes the charges that the RESPORGs must pay for access to, and use of, the Service Management System. The petitioners listed in Appendix D filed petitions for rejection, suspension or investigation of this tariff, to which the BOCs filed a joint reply denying that the tariff was unlawful.

6. The second type of tariff establishes the rate structure for 800 data base query service. Individual tariffs were filed on March 1, 1993 by LECs, listed in Appendix B, which own their own SCPs.

7. Eleven parties filed petitions against these tariffs to which nine LECs filed replies which denied that the tariffs were unlawful. *See* Appendix E.

8. The third type of tariff was filed on March 5, 1993 by LECs which do not own their own SCPs and must purchase query service from another entity. These LECs are listed in Appendix C. The parties listed in Appendix F filed petitions against these filings to which ten carriers filed replies which denied that the tariffs were unlawful.[5]

III. SMS/800 TARIFF

A. Pleadings

9. Four parties filed petitions against the BOCs' SMS/800 tariff. In its petition, Allnet Communications Services, Inc. (Allnet) argues that the transmittal does not comply with the Commission's affiliate transactions rules. Allnet also argued that the terms and conditions in the tariff fail to prevent the SMS/800 system from being administered in a way that discriminates in favor of the BOCs which own the SMS/800 and expresses concern about tariff provisions governing how quickly RESPORG changes must be made and the definition of "subscriber." Allnet also objects to the requirement that SMS/800 customers obtain liability insurance, including blanket contractual insurance specifically insuring for the terms of the SMS/800 tariff and to patent liability provisions which put the responsibility on RESPORGs for any patent infringement claims arising from the use of the SMS/800 system in conjunction with facilities or equipment furnished by the RESPORG.

10. Cubic Computer Company (Cubic) filed comments on the SMS/800 tariff seeking rejection of the proposed tariff. Cubic argues, among other things, that the SMS/800 tariff is probably illegal under current antitrust legislation and that the SMS/800 system should be operated by "private industry" and made accessible to all users, not just RESPORGs.

11. On March 22, 1993, MCI Telecommunications Corporation (MCI) filed a petition for rejection and suspension of the above-referenced transmittal. Among other issues, MCI argues that the BOCs have failed to provide information about the proper allocation of SMS/800 costs to the intrastate jurisdiction and have failed to follow the Commission's affiliate transactions rules. MCI also challenges the method used to allocate software support costs and questions whether the BOCs overrecover their SMS/800 costs when the total revenue from charges to RESPORGs and charges to SCP owners is considered. Finally, MCI states that the BOCs should be required to fully document their demand assumptions.

12. On March 22, 1993, Sprint Communications Company LP (Sprint) filed a petition asking the Commission to investigate the proposed SMS/800 tariff. Sprint argues that the BOCs provided insufficient information, particularly regarding the allocation of costs. Second, Sprint argues that the rates appear to be excessive because of understated demand forecasts. Third, Sprint argues that eligibility for RESPORGs, procedures for even-handed enforcement of the terms and conditions of the SMS/800 tariff, and mechanisms to handle future requests for enhancements to the SMS/800 system should be clarified.

B. Discussion

13. The SMS tariff raises significant questions of lawfulness regarding cost allocations, resulting rate levels, and terms and conditions of service that warrant suspension for one day, imposition of an accounting order, and investigation. We will designate specific issues and establish a pleading cycle for this hearing in a subsequent order.

IV. 800 DATA BASE QUERY TARIFFS

A. Pleadings

14. The Ad Hoc Telecommunications Users Committee (Ad Hoc), Aeronautical Radio, Inc. (ARINC), Allnet , American Telephone and Telegraph (AT&T), The California Bankers Clearing House Association *et. al.* (Cal. Bankers), CompuServe Incorporated (CompuServe), First Financial Management Corporation (First Financial), International Communications Association (ICA), MCI, National Data Corporation (National Data) and Sprint filed petitions against the 800 data base query tariffs filed by the LECs who own the SCPs. The petitioners allege that some or all of the LECs fail to provide adequate cost support to properly justify their proposed 800 data base query rates and vertical feature rates, claim exogenous cost treatment for costs which the Commission did not define as exogenous in this proceeding,[6] include overhead in calculating their exogenous costs,[7] and propose terms and conditions

[5] On March 22, 1993, AT&T filed a letter petition objecting to the per query rate in Vitelco's proposed tariff, alleging that the rate was based on a mathematical error. By letter of April 2, 1993, Vitelco acknowledged the computation error and stated that it would be withdrawing its tariff and providing 800 data base query service through another carrier. Vitelco filed tariff revisions cancelling its data base 800 query filing on April 26, 1993.

[6] *See* Provision of Access for 800 Service, Second Report and Order, 8 FCC Rcd 907 (1993); Allnet Petition at 5; MCI Petition at 6-8 and Appendix C (says Pacific claimed $7.6 million in tandem upgrade investment and expense and $1.5 million in SSP expenses, says Southwestern, Ameritech and U S West have also included SSP or access tandem expenses or investment); AT&T Reply at 3 (cites Pacific's access tandem costs as example of impermissible costs).

[7] AT&T Petition at 3 (claims that the LECs inclusion of overhead loadings in calculating exogenous costs is inconsistent with Commission's 800 Access Order); MCI Petition at 9 (claims that the LECs included the following overhead costs in their

that are either unlawful or unreasonably vague.[8] Petitioners further argue that the reasonableness of the SMS costs claimed by the LECs hasnot been demonstrated[9] and the LECs' treatment of vertical features is not clear and may be inconsistent with the Commission's orders.

15. In addition, on March 22, 1993, MCI filed a petition to reject and suspend and investigate many of the 800 data base tariffs filed on March 5, 1993 by LECs which do not own SCPs. MCI argues that some of these LECs fail to provide the requisite cost support for the charges in their tariffs.[10] MCI also argues that there are other deficiencies with some of these tariffs, including inappropriate demand assumptions, suspect estimates of unbillable data base queries, definitions of area of service routing which are either unreasonably vague or inconsistent with the Commission's order, impermissible bundling of basic query service and vertical features and unreasonably vague definitions of "query."[11]

B. Discussion

16. The data base 800 query tariffs of both those LECs owning the SCPs and those that do not own SCPs raise significant questions of lawfulness regarding cost allocations, resulting rate levels, and terms and conditions of service that warrant suspension for one day, imposition of an accounting order, and investigation. We will designate specific issues and establish a pleading cycle in a subsequent order.

17. Ameritech, Bell Atlantic, Nevada Bell, NYNEX, Pacific, SNET and United are all price cap carriers that included overhead costs in their calculation of exogenous costs.[12] Some of those carriers inappropriately rely on Commission decisions which authorize carriers to use overhead costs in the calculation of prices, but none of them have cited any authority for the use of overhead costs in calculating their exogenous costs.[13] Moreover, overhead costs are not properly included as exogenous costs of implementing 800 data base service. Exogenous treatment is generally afforded to costs that are triggered by administrative, legislative or judicial action beyond the control of the carriers.[14] In the present proceeding, the Commission allowed the carriers to treat as exogenous "the reasonable costs they incurred *specifically* for the implementation and operation of the basic 800 data base system...." (emphasis added).[15] None of the carriers have made a showing that they have experienced increases in overhead costs that are specifically attributable to the provision of data base 800. Under price caps, the carriers are already recovering their pre-existing overhead costs in their normal rates and allowing them to also recover overhead costs through their exogenous costs may provide them with an excessive recovery of those costs unless they had experienced an actual increase in overhead costs specifically attributable to the implementation or operation of the basic data base 800 service.

18. Therefore, Ameritech, Nevada Bell, NYNEX, Pacific, SNET and United filed invalid Price Cap Indices (PCIs) because they improperly included overheads in their calculation of the exogenous costs by which they adjusted their PCIs. Therefore, these carriers' PCIs should be recalculated at the levels displayed in Appendix G. Because the rate levels in these transmittals establish APIs that are below the PCIs in Appendix G, none of the filings violates the requirements of Sections 61.45(g) and 61.49(e) of our rules, 47 C.F.R. §§ 61.45(g) and 61.49(e), that a carrier's API not exceed its PCI. Thus, although we will investigate the exogenous cost claims of price cap carriers, no action on their rates is warranted at this time, except for the action we describe in the following paragraph.

19. We also performed a statistical analysis of the data base query rates proposed by the LECs which own their own SCPs. For this analysis, we reviewed the basic query rates in the transmittals to identify any that were anomalously high because they exceeded the industry mean rate plus one standard deviation. Such analysis, even though not exactly precise, is generally reasonable in this context since all LECs are deploying similar data base systems. In the present case, the industry mean rate was .0044 dollars per query and the standard deviation was .0023 dollars per query, resulting in a threshold rate of .0067 dollars per query. This threshold level was exceeded by GTOC (excluding GTOC - Alaska), GSTC and United. Therefore, we are partially suspending these rates under Section 204(a) of the Communications Act, 47 U.S.C. § 204(a), to the extent that they exceed .0067 dollars per query pending investigation of the reasonableness of the amounts in excess thereof.

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calculation of exogenous costs; Ameritech estimated at $4,000,000; Bell Atlantic $3,924,815; Pacific Bell $1,649,325; NYNEX $1,568,195; United $697,882; SNET $343,338).

[8] AT&T Petition at 5 (Ameritech, BellSouth and Southwestern appear to bundle POTs translation with basic 800 query service and set vertical services rates at zero); MCI Petition at 26, 33 (some LEC's definitions of Area of Service Routing are inconsistent with the Commission's order, several LECs have bundled vertical features with basic 800 query service).

[9] MCI Petition at 13. (Claims that billings by Bellcore to the NASC/800 SMS should be, at least as to the BOCs, regulated as affiliate transactions).

[10] MCI Petition against ALLTELL Telephone System, Tariff F.C.C. No. 1, *et al.*, Transmittal No. 6, *et al.*, at 5, 9 and n.18. MCI also filed a separate petition against Rochester Telephone Company F.C.C. Tariff No. 1, Transmittal No. 185, alleging that Rochester's tariff for Enterprise Telephone Company in Pennsylvania is deficient because it proposes to pass through the rates it is charged by the Independent Telecommunications Network (ITN) without providing any cost support for ITN's rates.

[11] *See generally* MCI Petition.

[12] Bell Atlantic's Tariff F.C.C. No. 1, Transmittal No. 566, filed on April 26, 1993, removed the overhead costs from its request for exogenous treatment and reduced the PCI to reflect this change. Therefore, we did not need to specify a level for Bell Atlantic's PCI.

[13] *See* Ameritech Reply at 4, n.9, citing Amendment of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, CC Docket Nos. 89-79 and 87-313; Report and Order on Further Reconsideration and Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 4524, ¶ 44 (1991) (Part 69/ONA Order); NYNEX Reply at 4, n.11, citing Part 69/ONA Order at ¶ ¶ 42-44 and Memorandum Opinion and Order on Second Further Reconsideration, 7 FCC Rcd 5510, ¶ 11 (1992).

[14] Policy and Rules Concerning Rates for Dominant Carriers, Second Report and Order, 5 FCC Rcd 6786, 6807 (1990).

[15] Provision of Access for 800 Service, Second Report and Order, 8 FCC Rcd 907 at ¶ 27 (January 29, 1993).

We believe this partial suspension is reasonable and in the public interest to protect ratepayers, while allowing carriers to charge reasonable rates for an interim period.

V. PROCEDURAL MATTERS

20. An original and four copies of all pleadings shall be filed with the Secretary of the Commission. In addition, one copy shall be delivered to the Commission's commercial copying firm, International Transcription Service, 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Members of the general public who wish to express their views in an informal manner regarding the issues in this investigation may do so by submitting one copy of their comments to the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C. 20554. Such comments should specify the docket number of this investigation.

21. All relevant and timely pleadings will be considered by the Commission. In reaching a decision, the Commission may take into account information and ideas not contained in pleadings, provided that such information is placed in the public file, and provided that the fact of reliance on such information is noted in the Order.

22. *Ex Parte* contacts (*i.e.*, written or oral communications which address the procedural or substantive merits of the proceeding which are directed to any member, officer, or employee of the Commission who may reasonably be expected to be involved in the decisional process in this proceeding) are permitted in this proceeding until a final Order is released and after the final Order itself is issued. Written *ex parte* contacts must be filed on the day submitted with the Secretary and Commission employees receiving each presentation. For other requirements, *see generally* Section 1.1200 *et. seq.* of the Commission's Rules, 47 C.F.R. §§ 1.200 *et. seq.*

23. The investigation established in this Order has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection, or recordkeeping, labeling, disclosure or other record retention requirements as contemplated under the statute.

VI. ORDERING CLAUSES

24. Accordingly, IT IS ORDERED that, the LECs listed in Appendices A, B and C SHALL FILE tariff revisions on April 29, 1993, to be effective on not less than one day's notice, in order to advance the effective dates of the above-referenced transmittals and any subsequent revisions.

25. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the tariffs listed in Appendices A, B and C, ARE SUSPENDED for one day.

26. IT IS FURTHER ORDERED that, pursuant to Sections 4(i), 204(a), 205(a) and 403 of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 204(a), 205(a) and 403, an investigation IS INSTITUTED into the lawfulness of the tariffs listed in Appendices A, B and C.

27. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 204(a) of the Communications Act, 47 U.S.C., 47 U.S.C. § 154(i) and 204(a) and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the LECs listed in Appendices A, B and C, SHALL KEEP ACCURATE ACCOUNT of all earnings, costs, and returns associated with the rates that are the subject of this investigation.

28. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the Bell Operating Companies, for the tariff listed in Appendix A, and each of the LECs listed in Appendices B and C, SHALL FILE tariff revisions reflecting this suspension on April 29, 1993.

29. IT IS FURTHER ORDERED that, the LECs referenced in Appendix G SHALL RECALCULATE their PCIs to the levels shown therein.

30. IT IS FURTHER ORDERED that, pursuant to Sections 4(i), 204(a), 205(a) and 403 of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 204(a), 205(a) and 403, an investigation IS INSTITUTED into the lawfulness of the exogenous costs claimed by the price cap LECs listed in Appendices B and C.

31. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act, 47 U.S.C. 204(a), the amount of the basic 800 data base query rate that exceeds .0067 dollars per query for United Telephone Company, GSTC and GTOC (excluding GTOC - Alaska) is HEREBY SUSPENDED for five months from the presently scheduled effective date, to October 1, 1993.

32. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the United Telephone Company, GSTC and GTOC (excluding GTOC - Alaska) SHALL FILE tariff revisions reflecting the partial suspension of their basic 800 data base query rates on April 29, 1993.

33. IT IS FURTHER ORDERED that, the LECs listed in Appendix C, SHALL FILE tariff revisions reflecting the flow-through of any reductions in the basic 800 data base query rates of the LECs listed in Appendix B. These revisions SHALL BE FILED no later than May 6, 1993, to be effective on not less than one day's notice.

34. IT IS FURTHER ORDERED that, for the above purposes, we waive Sections 61.56, 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58 and 61.59, and assign Special Permission No. 93-349.

35. IT IS FURTHER ORDERED that the petitions for rejection or suspension and investigation of the Bell Operating Companies' Tariff F.C.C. No. 1, Transmittal No. 1, listed in Appendix A, filed by Allnet Communications Services, Inc., Cubic Computer Company, MCI Telecommunications Corporation and Sprint Communications Company LP, ARE GRANTED to the extent indicated, and otherwise ARE DENIED.

36. IT IS FURTHER ORDERED that the petitions for rejection or suspension and investigation, of the tariff transmittals listed in Appendix B, filed by the Ad Hoc Telecommunications Users Committee, Aeronautical Radio, Inc., Allnet Communications Services, Inc., American Telephone and Telegraph Company, the California Bankers Clearing House Association, *et al.*, CompuServe Incorporated, First Financial Management Corporation, International Communications Association, MCI Telecommunications Corporation, National Data Corporation and Sprint Communications Company LP, ARE GRANTED to the extent indicated, and otherwise ARE DENIED.

37. IT IS FURTHER ORDERED that the petitions for rejection or suspension and investigation, of the 800 data base query tariffs listed in Appendix C, filed by American Telephone and Telegraph Company, MCI Telecommunications Corporation, Compuserve Incorporated and First Financial Management Corporation ARE GRANTED to the extent indicated, and otherwise ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

APPENDIX A

SMS/800 TARIFF

Bell Operating Companies	Tariff F.C.C. No. 1, Transmittal No. 1

APPENDIX B

800 DATA BASE ACCESS TARIFFS - SCP OWNERS

Ameritech Operating Companies	Tariff F.C.C. No. 2, Transmittal Nos. 698 & 701
Bell Atlantic	Tariff F.C.C. No. 1, Transmittal No. 560 & 566
BellSouth	Tariff F.C.C. No. 1, Transmittal Nos. 94 & 99
GTE System Telephone Companies (GSTC)	Tariff F.C.C. No. 1, Transmittal No. 36
GTE Telephone Operating Companies (GTOC)	Tariff F.C.C. No.1, Transmittal No. 775
NYNEX	Tariff F.C.C. No. 1, Transmittal No. 168
Pacific Bell	Tariff F.C.C. No. 128, Transmittal No. 1615, 1621 & 1622
SNET	Tariff F.C.C. No. 39, Transmittal No. 556
Southwestern Bell	Tariff F.C.C. No. 73, Transmittal No. 2264 & 2269
United Telephone Company	Tariff F.C.C. No. 5, Transmittal No. 316
U.S. West	Tariff F.C.C. No. 1, Transmittal No. 335

APPENDIX C

800 DATA BASE ACCESS TARIFFS - NON-SCP OWNERS

ALLTELL Telephone System	Tariff F.C.C. No. 1, Transmittal No. 6
Centel Telephone Companies	Tariff F.C.C. No. 1, Transmittal No. 219
Century Telephone of Ohio, Inc.	Tariff F.C.C. No. 1, Transmittal No. 6
Chillicothe Telephone Company	Tariff F.C.C. No. 1, Transmittal No. 39
Cincinnati Bell Telephone	Tariff F.C.C. No. 35, Transmittal No. 622
Citizens Utilities Companies	Tariff F.C.C. No. 1, Transmittal No. 5
Coastal Utilities, Inc.	Tariff F.C.C. No. 1, Transmittal No. 7
Dunkirk and Fredonia Telephone Company	Tariff F.C.C. No. 2, Transmittal No. 16
Elkhart Telephone Company	Tariff F.C.C. No. 1, Transmittal No. 40
Farmers Telephone Cooperative, Inc.	Tariff F.C.C. No. 1, Transmittal No. 4
Fidelity and Bourbouse Telephone Company, (Not petitioned against filed March 15, 1993)	Tariff F.C.C. No. Transmittal No. 35
Great Plains Communications, Inc.	Tariff F.C.C. No. 3, Transmittal No. 54
GTOC - Alaska	Tariff F.C.C. No. 1, Transmittal No. 776
GVNW Inc./ Management	Tariff F.C.C. No. 1, Transmittal No. 72
Hargray Telephone Company	Tariff F.C.C. No. 1, Transmittal No. 9
Illinois Consolidated Telephone Co.	Tariff F.C.C. No. 2, Transmittal No. 66
LaFourche Telephone Company	Tariff F.C.C. No. 1, Transmittal No. 10
Lufkin-Conroe 1 Telephone Exchange	Tariff F.C.C. No. 2, Transmittal No. 10
Lincoln Telephone and Telegraph Co.	Tariff F.C.C. No. 3, Transmittal No. 65 & 67
Millington Telephone Company, Inc.	Tariff F.C.C. No. 1, Transmittal No. 5
Mount Horeb Telephone Company	Tariff F.C.C. No. 1, Transmittal No. 6
National Exchange Carrier Association, Inc.	Tariff F.C.C. No. 5, Transmittal No. 540 & 548
Nevada Bell	Tariff F.C.C. No. 1, Transmittal Nos. 154 & 159
Northwestern Indiana Telephone Company	Tariff F.C.C. No. 1, Transmittal No. 3
Pineland Telephone Cooperative	Tariff F.C.C. No. 2, Transmittal No. 16
Rochester Telephone Corporation	Tariff F.C.C. No. 1, Transmittal No. 185
Roseville Telephone Company	Tariff F.C.C. No. 1, Transmittal Nos. 24, 25
Southeast Telephone Company of Wisconsin, Inc.	Tariff F.C.C. No. 2, Transmittal No. 8
Sugar Land Telephone Company	Tariff F.C.C. No. 2, Transmittal No. 13
Taconic Telephone Corporation	Tariff F.C.C. No. 1, Transmittal No. 15
Telephone Utilities Exchange Carrier Association (TUECA)	Tariff F.C.C. No. 1, Transmittal No. 116
Union Telephone Company	Tariff F.C.C. No. 1, Transmittal No. 32
Vista Telephone Company	Tariff F.C.C. No. 1, Transmittal No. 14
Vista-United Telecommunications	Tariff F.C.C. No. 1, Transmittal No. 8
Warwick Valley Telephone Company	Tariff F.C.C. No. 1, Transmittal No. 17

APPENDIX D

List of Petitions Against SMS/800 Tariff

Petitioner	Tariffs Petitioned Against
Allnet	BOCs, Trans. No. 1
Cubic Computer	BOCs, Trans. No. 1
MCI	BOCs, Trans. No. 1
Sprint	BOCs, Trans. No. 1

APPENDIX E

List of Petitions Filed Against Data Base Query Tariffs of SCP Owners

Petitioner	Tariffs Petitioned Against
Aeronautical Radio, Inc.	Ameritech, Transmittal No. 698 Bell Atlantic, Trans. No. 560 BellSouth Trans. No. 94 NYNEX, Trans. No. 168 Pacific, Trans. No. 1615 Southwestern, Trans. No. 2264 US West, Trans. No. 335
Ad Hoc	Ameritech, Transmittal No. 698 Bell Atlantic, Trans. No. 560 BellSouth Trans. No. 94 GTSC, Trans. No. 36 NYNEX, Trans. No. 168 Pacific, Trans. No. 1615 SNET, Trans. No. 556 Southwestern, Trans. No. 2264 US West, Trans. No. 335 NECA, Trans. No. 540
Allnet	Ameritech, Trans. Nos. 698&701 Bell Atlantic, Trans. No. 560 BellSouth Trans. No. 94 NYNEX, Trans. No. 168 Pacific, Trans. No. 1615 Southwestern, Trans. No. 2264 US West, Trans. No. 335
AT&T Ameritech,	Transmittal No. 698 Bell Atlantic, Trans. No. 560 BellSouth Trans. No. 94 Nevada Bell, Trans. No. 154 NYNEX, Trans. No. 168 Pacific, Trans. No. 1615 SNET, Trans. No. 556 Southwestern, Trans. No. 2264 United, Trans. No. 316 US West, Trans. No. 335
Cal. Bankers	Not Specified
CompuServe and First Financial	Ameritech, Transmittal No. 698 Bell Atlantic, Trans. No. 560 BellSouth Trans. No. 94 GTOC, Trans. No. 775 GSTC, Trans. No. 36 Illinois Consolidated, Trans. No. 66 NECA, Trans. No. 540 NYNEX, Trans. No. 168 Pacific, Trans. No. 1615 Rochester, Trans. No. 185 SNET, Trans. No. 556 Southwestern, Trans. No. 2264 United, Trans. No. 316 US West, Trans. No. 335
ICA Ameritech,	Transmittal No. 698 Bell Atlantic, Trans. No. 560 BellSouth Trans. No. 94 GTOC, Trans. No. 775 NYNEX, Trans. No. 168 Pacific, Trans. No. 1615 SNET, Trans. No. 39 Southwestern, Trans. No. 2264 US West, Trans. No. 335
MCI Ameritech,	Transmittal No. 698 Bell Atlantic, Trans. No. 560 BellSouth Trans. No. 94 GTSC, Trans. No. 36 GTOC, Trans. No. 775 NYNEX, Trans. No. 168 Pacific, Trans. No. 1615 SNET, Trans. No. 556 Southwestern, Trans. No. 2264 United, Trans. No. 316 US West, Trans. No. 335
National Data	Ameritech, Transmittal No. 698 Bell Atlantic, Trans. No. 560 BellSouth Trans. No. 94 GTSC, Trans. No. 36 GTOC, Trans. No. 775 NECA, Trans. No. 540 NYNEX, Trans. No. 168 Pacific, Trans. No. 1615 SNET, Trans. No. 556 Southwestern, Trans. No. 2264 United, Trans. No. 316 US West, Trans. No. 335
Sprint Ameritech,	Transmittal No. 698 Bell Atlantic, Trans. No. 560 BellSouth Trans. No. 94 GTSC, Trans. No. 36 GTOC, Trans. No. 775 Telesector Resources Group, Trans. No. 168 Pacific, Trans. No. 1615 SNET, Trans. No. 556 Southwestern, Trans. No. 2264 US West, Trans. No. 335

APPENDIX F

Petitions Against 800 Query Tariffs Filed by Non-SCP Owners

Petitioner	Carrier Petitioned Against
AT&T	Nevada Bell, Trans. No. 154 Vitelco, Trans. No. 14
CompuServe and First Financial	Illinois Con., Trans. No. 66 NECA, Trans. No. 540 Rochester, Trans. No. 185
General Communications, Inc.	NECA, Trans. No. 548
MCI	ALLTELL, Trans. No. 6 Century of Ohio, Trans. No. 6 Chillicothe, Trans. No. 39 Cincinnati Bell, Trans. No. 622 Citizens Util., Trans. No. 5 Coastal Util., Trans. No. 7 Dunkirk, Trans. No. 16 Elkhart, Trans. No. 40 Farmers, Trans. No. 4 Great Plains, Trans. No. 54 GVNW, Trans. No. 72 Hargray, Trans. No. 9

	Illinois Con., Trans. No. 66
	LaFourche, Trans. No. 10
	Lufkin-Conroe, Trans. No. 10
	Lincoln, Trans. No. 65
	Millington, Trans. No. 5
	Mount Horeb, Trans. No. 6
	NECA, Trans. No. 540 & 548
	Nevada Bell, Trans. 154
	N.W. Indiana, Trans. No. 3
	Pineland, Trans. No. 16
	Rochester, Trans. No. 185
	Roseville, Trans. Nos. 24 & 25
	S.E. Wisconsin, Trans. No. 8
	Sugar Land, Trans. No. 13
	Taconic, Trans. No. 15
	TUECA, Trans. No. 116
	Union, Trans. No. 32
	Vista, Trans. No. 14
	Vista-United, Trans. No. 8
	Vitelco, Trans. No. 14
	Warwick Valley, Trans. No. 17
MCI (Second Petition)	Rochester, Trans. No. 185

APPENDIX G

ADJUSTED PCI RESULTING FROM EXCLUSION OF OVERHEADS

	EXISTING PCI A	EXOGENOUS COSTS B	OVERHEADS C	ADJUSTED PCI D
AMERITECH	94.4100	$9,706,638	$3,444,771	95.1067
NEVADA BELL	95.0920	$291,461	$62,088	95.5605
NYNEX	99.1409	$5,880,385	$1,568,195	99.4281
PACIFIC BELL	91.7400	$15,666,349	$1,649,325	94.3347
SOUTHERN NEW ENGLAND TEL	101.3677	$1,089,562	$343,348	101.8582
UNITED – FLORIDA	84.5648	$2,283,777	$232,725	87.2247
UNITED – INDIANA	92.3216	$203,696	$22,886	93.8998
UNITED – NORTH CAROLINA	95.3376	$1,505,771	$170,174	98.5819
UNITED – OHIO	96.1302	$712,426	$74,226	98.4966
UNITED – EASTERN	93.8890	$629,768	$70,640	96.4000
UNITED – MIDWEST	94.7937	$648,076	$59,652	96.2425
UNITED – NORTHWEST	81.3108	$260,852	$24,092	83.2210
UNITED – SOUTHEAST	94.6191	$414,026	$43,020	97.5061

Note:
Bell Atlantic adjusted its PCI for both Transmittal No. 560 and Transmittal No. 566.
LECS will recalculate their PCIs to reflect the adjusted PCIs in column D.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-267

In the Matter of

Review of the Technical
Assignment Criteria for the
AM Broadcast Service

MEMORANDUM OPINION AND ORDER

Adopted: April 13, 1993; Released: April 29, 1993

By the Commission: Commissioner Barrett concurring and issuing a statement.

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I. INTRODUCTION

1. This *Memorandum Opinion and Order* addresses issues raised in petitions for reconsideration of the *Report and Order* in this proceeding concerning the AM broadcast service.[1] That *Report and Order* took major steps to improve technical standards, to reduce the level of interference in the existing AM band, to encourage certain existing licensees to move into the expanded portion of the AM band, and to consolidate existing broadcasting facilities in order to further reduce congestion and interference in the existing band.

2. The *Report and Order* was the culmination of an omnibus rule making begun in 1987 to review all AM technical and legal standards, rules and policies with the intent of making needed revisions and devising new approaches that would help achieve a significantly improved AM service.[2] To help reach this goal, we relied on three essential and mutually supportive elements designed to assist in reducing congestion and interference in the AM band. The first element, Technical Standards, implemented new and revised AM technical standards that should reduce the interference with which AM broadcasters must contend in their primary service areas. The second element, Migration, opened ten new frequencies in the expanded band (1605-1705 kHz) to those existing stations that most significantly contribute to congestion and interference in the existing band. The third element, Consolidation, provided broadcasters greater incentive and flexibility to reduce interference through non-technical means. The *Report and Order* also addressed the issue of AM stereo as a means of making the AM service more competitive and relaxed the rules pertaining to Travelers Information Stations to allow for the authorization (on a secondary basis) of such stations on any assignable frequency in the AM band. Also, the *Report and Order* dealt with several other miscellaneous and administrative matters necessary to the implementation of the various initiatives adopted.

II. SUMMARY

3. Twenty-two petitions for reconsideration of the *Report and Order* have been filed.[3] Generally, the parties filing in this reconsideration proceeding supported the actions taken in the *Report and Order*. Those filing petitions for reconsideration, comments and reply comments mainly seek clarification or revision of specific rules or policy decisions relating to the new technical standards, the migration of existing licensees to the expanded band, the matter of AM receiver standards, Travelers Information Stations, and other miscellaneous matters. This Memorandum Opinion and Order addresses the issues raised in the petitions. Except for minor modifications to our technical standards and a reordering of the priorities governing migration to the expanded band, this Order affirms the decisions reached in the *Report and Order*.

III. TECHNICAL STANDARDS

A. Nighttime Interference Calculations.

4. *Background.* In the NPRM, we proposed an RSS 0% exclusion and a 1 mV/m limit threshold as the basis for a stricter nighttime calculation methodology. Additionally, the NPRM proposed to require existing stations that already exceeded this threshold to reduce their signal by 10% when proposing to modify their facilities. Most commenters opposed this proposal because it substantially reduced licensees' ability to modify and improve their stations. In response to their concerns, a modified approach was adopted in the *Report & Order*. The modified approach places

[1] *Report and Order* in MM Docket No. 87-267, 6 FCC Rcd 6273 (1991).
[2] *Notice of Inquiry*, 2 FCC Rcd 5014 (1987); *Notice of Proposed Rule Making* (NPRM), 5 FCC Rcd 4381 (1990).
[3] Appendix A lists the parties filing in the reconsideration proceeding. While the petitions for reconsideration submitted by John R. Furr and the Illinois Department of Transportation were filed late, they will be treated as informal comments since we find that no party to this proceeding will be prejudiced thereby.

nighttime interference contributors into one of three categories: (a) high-level interferers, those which contribute to a station's 50% RSS; (b) mid-level interferers, those contributing to a 25% but not a 50% RSS; and (c) low-level interferers, those that do not enter the 25% RSS. Stations falling into the high interferer category must reduce radiation by 10% toward each affected station if a modification is proposed. Stations in the mid-level category are allowed to maintain current levels of radiation and stations falling in the low interferer category can increase radiation up to the 25% exclusion. New stations would have to comply with the low level, category (c), requirements. Both co- and adjacent channel contributions are considered in these calculations.

5. *Comments.* Several petitioners (CDE, dLR, Burrow) expressed concern that the impact of the adopted nighttime interference reduction method would fall most heavily on the older Class A and B stations. It is precisely these stations, dLR maintains, that generally will be most in need of modifications because of their older and oftentimes deteriorating antenna systems. LSC expressed concern that service losses resulting from the application of the adopted provisions might, in actuality, outweigh service gains arising from any reduction in interference.

6. Petitioners suggested a variety of alternatives as possible remedies to the perceived unfairness of our adopted nighttime interference reduction provisions. LSC and AFCCE suggested that the 10% reduction be applied only when the application proposes to increase power by 3 dB (double) or more. LSC also suggested that the 10% reduction requirement should be waived where it is demonstrated that applying the requirements would cause a net reduction in service. As an alternative, dLR suggests that stations proposing changes that are contributing to the 50% RSS of other stations should be allowed to maintain radiation rights to these other stations. CDE also presented several alternatives. CDE explains that for some stations proposing changes, a 10% reduction would drop the station from the 50% exclusion category to the 25% exclusion category. In these situations, CDE recommends that the rule be changed to require either 10% reduction or a reduction sufficient to remove the station from the 50% exclusion calculation, whichever is less. CDE also recommends that, in order to encourage the use of stereo in the AM band, the FCC eliminate the 10% reduction requirement for stations that choose to broadcast in AM stereo. For "all talk" stations, where stereo would be of little or no benefit, CDE suggests that installation of an appropriate audio filter could be substituted for the 10% reduction.

7. NAB maintains that the Commission should establish a clear waiver policy for the 10% interference reduction rule to cover stations that are forced to make involuntary changes. NAB agrees with some of the petitioners that existing stations should be allowed some latitude to make certain voluntary improvements to their facilities without being penalized by the full 10% interference reduction criteria. NAB supports CDE's proposal to require either a 10% reduction or a reduction sufficient to remove it from the 50% exclusion calculation, whichever is less. NAB also supports AFCCE's proposal that stations adversely affected by environmental changes should be able to augment their directional pattern without being subject to the 10% reduction criteria.

8. Petitioners raise other matters relating directly or indirectly to the adopted nighttime calculation methodology. Burrow, who opposes our 3 tier approach, is also opposed to the inclusion of adjacent channel contributions to the RSS since it will result in a reduction in predicted coverage and will thus have an adverse economic impact on AM stations. AFCCE and Burrow both express concerns related to the consequences of applying domestic interference standards that are more strict than those contained in international agreements. They fear that stations in other countries could increase radiation toward this country, thus negating the practical effect of the interference decreases mandated by the new domestic rules. AFCCE questions whether the 10% reduction was intended to apply to pattern augmentations and suggests some minor clarifications and revisions to the rules. dLR questions the applicability of the 10% reduction to stations already at minimum radiation because of the minimum Q-factor permitted.

9. *Discussion.* We have carefully considered whether to further relax the modified nighttime interference standards as suggested by several petitioners. We conclude, however, that with one exception, the Rules and procedures adopted in the *Report and Order* strike an appropriate balance between the need to improve those situations where significant interference impairs a station's signal quality, and the need for flexibility in our treatment of applications for modification of station facilities where the interference involved is less significant.

10. A fundamental focus of the entire AM proceeding has been to ameliorate the interference present in the AM Band. The requirement for a 10% signal reduction under certain circumstances is a key element of our plan to accomplish this goal. In fact, it is the only provision adopted in the *Report and Order* that will directly reduce interference in the AM band. The standards and procedures adopted in the *Report and Order* were themselves a carefully crafted relaxation of the proposals set forth in the NPRM made in response to commenters concerns. We believe that any further major compromises in our approach would significantly diminish the possibility of meaningful nighttime interference reduction in the AM band.

11. We note that virtually all of the suggestions presented by the petitioners involve exceptions to the 10% reduction provision for certain special case situations. Some suggest that the 10% reduction not apply in the special case where power is increased by less than 3 dB, or where the resulting net area served is decreased. Yet all of these proposals would, if put into effect, significantly lessen the benefit of the 10% reduction provision. A principle objective of the rule making, however, is to restore the technical quality of AM service rather than to benefit a few narrow segments of that industry. Thus, we decline to make any substantial changes to the interference criteria adopted in the *Report and Order.*

12. Petitioners have persuaded us, however, to make one minor adjustment to our approach to nighttime interference calculations. In situations where a station proposing a change in facilities presently is included within the 50% RSS of another station, but with a reduction of less than 10% would drop into the mid-level 25% category, we agree with the petitioners who argue that it would be inequitable to require the station to meet the full 10% reduction criteria. In fact, in certain situations, such a 10% reduction could result in a station's interference contribution falling below that of other stations already in the 25% category. Accordingly, we are revising our rules governing these situations to require either an interference reduction of

10% or a lesser amount that would be sufficient to remove the station's interference contribution from the 50% exclusion calculation, whichever is the smaller change.

13. With regard to the suggestion that we establish a clear waiver policy for stations that must make involuntary changes, we believe that adoption of such a policy would likely limit our future flexibility to determine when waivers are warranted. We continue to believe that the case-by-case waiver policy articulated in paragraph 71 of the *Report and Order* is a more effective tool for determining whether applying the 10% reduction rule in a given situation will serve the public interest.

14. With respect to Burrow's opposition to the 3 tier approach and inclusion of adjacent channel signals, we note that he offered no information or argument not previously considered. Therefore, we deny his requested changes.

15. AFCCE and Burrow expressed concerns about the potential consequences of applying domestic interference standards that are more strict than those contained in international agreements. However, we believe it extremely unlikely that these changes to our domestic rules would permit foreign stations to increase radiation toward the United States. Nor do we believe that any significant radiation rights of U.S. stations would be lost internationally as a result of our changes. Nonetheless, we will carefully monitor any international activity that could possibly result in loss of domestic radiation rights. If indeed it appears that U.S. stations could actually suffer any significant loss of radiation rights internationally, we will take whatever steps are necessary to preserve U.S. interests.

16. Regarding AFCCE's concern about applicability of the 10% reduction provisions to augmentations needed to comply with the terms of a construction permit, we did not intend to make the 10% reduction applicable in routine augmentation cases necessitated by an out-of-tolerance proof-of-performance filed with a license application to cover an outstanding construction permit. On the other hand, we are convinced that augmentations necessitated by antenna readjustments caused by environmental changes or other circumstances beyond the licensee's control should be considered for waiver of the 10% reduction requirement, if otherwise applicable, on a case-by-case basis. Likewise, waivers related to reductions beyond the minimum pattern Q will also be handled on a case-by-case basis in accordance with Footnote 39 of the *Report and Order*.

B. Normally Protected Contour.

17. *Background.* A station's normally protected contour defines the area within which it is desirable to promote quality service and minimize interference, insofar as possible. During the comment phase of this proceeding, some parties proposed to change the Class B daytime protected contour to the 2 mV/m contour, from the 0.5 mV/m contour currently specified in the Commission's Rules. Such a change would, generally, permit many stations to increase their daytime power, and, therefore, provide a stronger signal in areas where it was alleged that the natural and man-made noise level precluded reception of 0.5 mV/m signals. The *Report and Order* retained the 0.5 mV/m protected contour for Class B stations operating during daytime.

18. *Comments.* CDE and dLR proposed to make the 1 mV/m contour the Class B protected contour, which would allow many stations to increase power. They argue that increases in man-made noise and the new preference for stereo operation in the expanded band indicate that such a change is needed.

19. *Discussion.* Paragraph 56 of the *Report and Order* noted that 2 mV/m signals were needed for satisfactory wide-band reception, which would provide for the best reception of stereo signals. Indeed, this fact was crucial to our decision regarding the adjacent channel protection ratio, where we decided to apply a 6 dB protection ratio at the 0.5 mV/m contour that would only protect narrow band signals from adjacent channel interference, with wide-band reception protected at the 2 mV/m contour. Since CDE and dLR provided no new information in this matter in their petitions, no change in our decision is warranted.

C. "Simple" Directional Antennas in the Expanded Band.

20. *Background.* The Commission generally requires that a full Proof-of-Performance be submitted at the licensing stage for a directional AM station in order to demonstrate that the antenna system is operating within the authorized construction permit limits. Sections 73.151 and 73.186 set forth the specific requirements for the field strength measurement data necessary. These sections include details such as the number of measured radials necessary, their locations relative to pattern lobes and nulls, number and location of data points on each radial as well as other information essential to ensure that the actual antenna system is operating within specified tolerances. Often, full Proofs-of-Performance are extremely complex and time consuming, frequently necessitating the services of consulting engineers specializing in this area. At times, these proofs can also be prohibitively expensive. With these factors in mind, the Commission found it desirable to explore possible alternatives to full Proofs-of-Performance for directional AM stations in the expanded band. The *Report and Order* defined a simple directional antenna as one which uses two towers. Since interference prevention in the expanded band will be primarily accomplished by means of inter-station spacings, we decided that extensive proof-of-performance requirements would not be necessary for such simple directional antennas. Instead, for simple directional antennas in the expanded band, a measured radial would be required only in the directions for which the facility is short-spaced to other co-channel or adjacent channel stations.

21. *Comments.* AFCCE contends that the definition of simple directional antenna is vague and does not take into account the radiating characteristics of the pattern or the nature of the radiating elements themselves. AFCCE suggests that a simple directional antenna should be defined as one using series-fed radiators without top-loading or sectionalization. Further, AFCCE requests that a maximum-to-minimum radiation limit of 15 dB or less be established.

22. *Discussion.* The reason for exemption from the normal proof-of-performance requirements for simple directional antennas in the expanded band is that spacings between stations will make patterns with deep nulls unnecessary for protection purposes. Our experience over the years with AM directional arrays leads us to conclude that the definition of a "simple" directional antenna as one with two towers is sufficient for the limited purpose of distinguishing those antennas for which full Proof-of-Performance can be waived without being unnecessarily complex. No evidence has been presented to convince us that a

more detailed definition is necessary under the circumstances, and thus we will not alter the conclusions of the *Report and Order*.

D. 80% Coverage Criteria.

23. *Background.* The Commission has had a policy that 80% coverage of the principle community is sufficient for AM nighttime coverage requirements. The *Report and Order* codified this policy into the Rules in Section 73.24(i).

24. *Comments.* AFCCE states that the Commission has applied the 80% coverage criterion to the fulltime service of FM stations in recent years. AFCCE requests clarification as to whether the Commission intends to extend this 80% coverage criterion to the daytime operations of AM stations as well.

25. *Discussion.* The Commission did not intend to extend the existing "substantial compliance" policy for nighttime coverage to the daytime operation of AM stations. Rather, our intent was to codify the existing policy. Coverage of AM stations often varies widely from day to night. In fact, many AM stations operate with different power and antenna patterns day and night. For these reasons, we do not believe it is unreasonable to draw a distinction between coverage standards for day and night service. Further, the focus of this proceeding is the improvement of the AM service as a whole. Relaxation of coverage requirements is not generally consistent with that objective. Finally, AFCCE has shown no compelling need for a relaxation of AM daytime coverage requirements. Accordingly, we will make no changes in this rule.

E. Section 73.37(b).

26. *Background.* The *Report and Order* deleted Section 73.37(b) of the Commission's Rules. Consequently, the Commission no longer will permit a first local AM service to receive added interference within its 0.5 mV/m contour and up to its 1 mV/m contour.

27. *Comments.* Larry S. Tschirhart and dLR ask the Commission to reconsider its decision to delete section 73.37(b). Petitioners claim that if a station's nighttime operation can accept interference and still provide an interference-free signal over much of the city, it is only fair that daytime facilities receive the same treatment. Furthermore, they argue, retention of the provisions of section 73.37(b) would not have a deleterious effect on the availability of wideband radios since this rule applies to co-channel received interference only. Petitioner Jeffrey N. Eustis requests the Commission to consider the effect of the rule's deletion on those existing stations authorized as first service under Section 73.37(b) who wish to change their community of license. Such changes, from one first service community to presumably a larger first service community, may occur due to loss of a transmitter site, or the desire to serve a larger, rapidly growing neighboring area. Such moves will be impossible if a station cannot receive interference up to its new 1.0 mV/m at the new community. Therefore, Eustis reasons, Section 73.37(b) is a pro-service rule that has served the industry well in the past and can continue to do so.

28. On the other hand, the National Association of Broadcasters applauds the Commission decision to delete Section 73.37(b) of the Commission's Rules. NAB also proposes the deletion of Section 73.37(c) and (d). Section 73.37(c) allows Class C stations to receive overlap to their 0.5 mV/m contour under the assumption that both the proposed operation and all existing Class C stations operate with 250 watts and use non-directional antennas for proposals requesting 1 kw. The same rationale applies for Section 73.37(d) where 100 watt Class C stations may propose to increase their power to 500 watts.

29. *Discussion.* While we understand the petitioners' arguments, we continue to believe that Section 73.37(b) encourages substandard operations and permits increased AM congestion and distorted service areas. Nighttime interference received is a function of stations already operating on the channel and is beyond the control of the applicant. Daytime interference received, however, is a function of both existing stations causing interference and the proposed facilities modifications. We note that our rules permit stations that already receive interference to their 1 mV/m contour to change sites or communities of license as long as there would be no net increase in the area within their 0.5 mV/m contour. Finally, regarding NAB's suggestion that we delete sections 73.37(c) and (d), we conclude that these sections should be maintained to accommodate modifications for the existing Class C stations. The probability of a new Class C station in the existing band is not great since these frequencies are already virtually saturated.

F. Applications for New Daytime-Only Stations in the Existing Band.

30. *Background.* The Commission discontinued the authorization of new daytime-only stations in 1987. In the *Report and Order* the Commission decided not to authorize new daytime-only stations in the expanded band.

31. *Comments.* Jeffrey Eustis supports acceptance of certain daytime-only applications in the existing band under limited circumstances. NAB supports the freeze on new AM daytime-only stations as well as its logical extension to the expanded band. NAB cites the likely diminution of at least some daytime coverage and probable future urging by daytime-only stations for extended hours.

32. *Discussion.* Petitioner presents no new information or arguments to persuade us that a continuation of the prohibition on the authorization of new daytime-only AM applications is not in the public interest. Each additional daytime-only station has a substantial preclusive effect on the potential assignment of unlimited-time stations on seven channels: the channel occupied by the daytime station, and three adjacent channels higher and lower in frequency. Moreover, the preclusive effect of additional daytime-only stations would not be confined to blocking possibilities for new unlimited-time stations. Such stations could also foreclose opportunities for existing stations to improve their nighttime services to the public because some stations may need to change their daytime facilities in order to upgrade their nighttime service. For these reasons we decline to encourage the filing of applications for more AM daytime-only stations.

IV. MIGRATION

33. *Background.* The Commission decided, as had been proposed in the NPRM, to limit initial eligibility to occupy the expanded band to existing stations. It declined to reserve channels in the expanded band for minorities or non-commercial operations, concluding that to do so would be inconsistent with the public interest objectives of reducing interference and congestion and improving technical quality in the existing AM band. It also concluded that little, if any, overall improvement in AM reception in

the existing band would be gained by allowing Class C (formerly Class IV) stations to migrate to the expanded band. The Commission further found that there is nothing in the record to show that the migration of Class C stations would significantly reduce overall interference in the existing band.

34. The *Report and Order* also established an order of priority for migration by existing licensees to the expanded band. Fulltime licensees who would most reduce interference and congestion by moving to the expanded band would be given top priority for slots in that band. If no fulltime station asked for a particular channel in an area, the next priority would go to daytime stations located within the 0.5 mV/m-50% skywave contours of Class A stations and which are licensed to serve communities of 100,000 or more that currently lack a local fulltime aural service. The next priority would go to other daytime-only stations that under current rules cannot operate at night. Finally, for ranking applicants within the respective fulltime and daytime categories, improvement factors were defined as the ratio of nighttime and daytime interference caused to the amount of nighttime and daytime service that the station provides.

35. Petitioners request that we reconsider: (a) our decision to restrict eligibility to migrate initially to existing licensees excluding Class C stations; (b) the order of migration priority among the eligible classes of existing licensees; and (c) the improvement factor we would use to rank applicants within each of these categories.

A. Migration Eligibility

36. *Reserved Channels for Minorities.* In a joint petition, the National Association for the Advancement of Colored People, the League of United Latin American Citizens and the National Black Media Coalition assert that awarding 100% of the expanded band to incumbent broadcasters "will have little or no impact on AM band interference," whereas awarding some of the expanded band to minorities would substantially alleviate the "gross underrepresentation" of minorities in the ownership of broadcast stations.[4] Petitioners also, for the first time, propose a scheme whereby incumbent broadcasters migrating to the expanded band would be issued tax certificates for selling their existing band stations to minorities. The seller would retain its license for a station in the expanded band. As part of this proposal, the minority buyers would then be allowed to operate these existing band stations together with new expanded band stations to be awarded them for a five year transitional period. Petitioners argue that this approach would give a cash infusion (along with a tax certificate) to any incumbent migrating to the expanded band and ensure the more rapid occupation of the band with incumbents plus minorities. Finally, petitioners point to a study by the NTIA released after adoption of the *Report & Order* that shows a decrease in the percentage and number of minority owned stations between 1990-91. They contend that such a decrease compels the Commission to reconsider its decision.[5]

37. *Discussion.* We decided in the *Report and Order* to restrict initial eligibility for expanded band allotments to existing licensees to maximize interference and congestion reduction in the existing band. We concluded that initially allowing new applicants in the expanded band would not further that primary goal of interference and congestion reduction. For the same reason we declined to reserve exclusive use of channels for minority, female or educational entities. Reserving even one channel of the ten available for a particular group's exclusive use would reduce by 10% the expanded band capacity available for achieving interference and congestion reduction. The petitioners have offered no persuasive reason for altering the *Report and Order* with respect to the issue of reserved channels in the expanded band. The Commission is concerned about the NTIA study cited by the petitioners showing a decrease in the percentage and number of minority owned stations between 1990-91. As noted earlier, we recognize that increasing the levels of minority ownership promotes diversity and therefore advances the public interest. Indeed, the Commission has taken action through further revisions to the radio ownership rules to address the need to increase opportunities for minority ownership. *See Revision of Radio Rules and Policies,* 7 FCC Rcd 6387 (1992) (reinstating and expanding minority ownership incentives). Moreover, minority applicants will have the opportunity to apply for channels remaining after the initial migration, using available comparative preferences. Petitioners' new proposal regarding the use of tax certificates is not a viable option in light of our decision to limit initial migration to the expanded band to existing licensees, and to require the eventual deletion of one existing band station for every expanded band station authorized. Moreover, this proposal would undermine the basic rationale of our decision, *i.e.,* the overall reduction of interference and congestion in the existing band. Also, the proposal is untimely since it is an entirely new proposal that should have been submitted earlier as a comment in response to the *NPRM.*

38. *Class C Licensees.* In its petition for reconsideration the National Association of Broadcasters (NAB) requests that the Commission consider giving Class C (formerly Class IV) licensees a chance to migrate to the expanded band during the "second round" of licensing. While it concedes that the migration of Class C stations to the expanded band may not result in the degree of interference reduction that might be achieved by the migration of other, higher-powered stations, NAB asserts that equity dictates giving these licensees a chance to migrate after the initial round of licensing. Petitioner notes that fifty-four Class C licensees had submitted letters of intent to migrate.

39. *Discussion.* The NAB has failed to refute our conclusion that little, if any, overall improvement in reception in the existing AM band would be gained by allowing Class C

[4] Petitioners have submitted no evidence in support of their claim that awarding all of the expanded band to incumbents will have little or no impact on interference.

[5] In paragraph 109 of the *Report and Order,* we noted that Multilingual Communications Association and Global Broadcasting System, Inc. had suggested that channels in the expanded band be set aside for minorities and women. Both parties have advised the Commission that this statement mischaracterizes their respective positions. In fact, in its comments, Multilingual only asked that the expanded band be made available to all currently eligible parties while Global specifically asks that one channel be set aside for applicants who propose to provide multi-ethnic, multilingual broadcast service on a nonprofit basis.

stations to migrate, and we decline to grant its request. As explained in the *Report and Order,* Class C stations provide local service to small communities without regard to either service or interference beyond their immediate service areas. Most Class C stations operate at a power of 1 kW, day and night, without consideration of interference to other Class C stations. Even if it were possible to accommodate a relatively large number of Class C stations in the expanded band, which is not feasible, no evidence has been presented anywhere in this proceeding to persuade us that any significant improvement in AM reception on Class C channels would result. For these reasons, we continue to find Class C stations ineligible for migration to the AM expanded band.

B. Existing Stations Causing Interference and Preferred Migrators.

40. *Background.* After the close of the comment period in this proceeding, Congress amended Section 331 of the Communications Act to add Section 331(b). Section 331(b) requires that, if technically feasible, the Commission must find a means to enable current daytime-only stations located in communities of more than 100,000 and within a Class I station primary service area to provide service to those communities 24 hours a day, if these licensees notify the Commission that they seek to provide fulltime service.[6]

41. *Comments.* In its petition for reconsideration, Radio Elizabeth, Inc., licensee of daytime-only AM station WJDM, Elizabeth, New Jersey, notifies the Commission that it seeks to provide full-time service to Elizabeth, New Jersey which has a population of more than 100,000 and is located within the primary service area of a Class I (now Class A) station. It contends that revising Section 73.30 of the Rules on reconsideration to give an overriding preference for migration to the expanded band to this special class of daytime-only AM stations is the obvious means of complying with the goals of Section 331(b) of the Act. Petitioner submits that the scope of the notice given in the NPRM envisioned establishing a set of priorities for migration and that the revision of these priorities on reconsideration is proper and does not require a further rule making. Petitioner states that apparently no more than four or five AM daytime-only stations across the country would fall in this special category.

42. *Discussion.* The NPRM in this proceeding gave notice of our intention to establish a set of priorities for the migration of existing AM licensees to the expanded band. While the *Report and Order* placed stations such as WJDM, in Elizabeth, New Jersey in the number 2 priority category, we now revise our criteria. This revision enables us to comply with the subject amendment to the Communications Act, which reflects a congressional determination that enabling stations like WJDM to offer fulltime local service would be a significant benefit to the public interest. Furthermore, we find that, in view of the few stations involved, this reordering of the priorities does not impede our main policy objective of interference and congestion reduction in the existing AM band. Accordingly, Section 73.30 of the Commission's Rules will be amended to provide that stations defined in Section 331(b) of the Communications Act be given the first priority for migration to the expanded band. *See Policy Statement In the Matter of Amendment of Section 331 of the Communications Act of 1934,* 7 FCC Rcd 4905 (1992).

C. Improvement Factors

43. *Comments.* AFCCE and LSC assert that the ratio used to rank licensees seeking to migrate to the expanded band does not take service gains and losses directly into account[7] and therefore does not satisfy Section 307(b) considerations. AFCCE suggests that the ratio be calculated based upon the net change in total service area rather than the ratio of interference caused to service provided. Specifically, AFCCE requests that the ratio be redefined "by using the sum of the migrating station's and other stations' service differences as the numerator and the migrator's existing service as the denominator." In essence, this proposal adds an additional factor for the net change in service area for the migrating station in the numerator. LSC concurs with AFCCE on this matter.

44. Schober maintains that if a former Class II-S and III-S (now Class D) station enters the 25% exclusion RSS of some stations, it should be given nighttime improvement factor credit in priority ranking for the expanded band. CDE also supports adopting additional provisions to enhance the opportunities for Class D stations to migrate to the expanded band.

45. Schober also suggests that "immediate" migrators, those willing to relinquish their existing band licenses immediately as opposed to within 5 years, should be given some priority enhancement because they will improve the interference situation immediately as opposed to 5 years from now. Finally, Schober believes that existing stations on 1590 and 1600 should be given a special preference because they preclude operations on 1610 and 1620 in the expanded band.

46. Polnet maintains that our prioritization scheme is contradictory. It notes that on the one hand we claim that reduction of daytime interference is important enough to warrant considering a fulltime station's daytime interference in calculating its ranking within the fulltime station category, yet we continue to maintain an entirely separate category for daytime stations in the ranking. Polnet argues that a daytimer, who by migrating could eliminate massive

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[6] Section 331(b) of the Communications Act of 1934, as amended, reads as follows:

> (b) AM RADIO STATIONS -- It shall be the policy of the Commission, in any case in which the licensee of an existing AM daytime-only station located in a community with a population of more than 100,000 persons that lacks a local full-time aural station licensed to that community and that is located within a Class I station primary service area notifies the Commission that such licensee seeks to provide full-time service, to ensure that such a licensee is able to place a principal community contour signal over its entire community of license 24 hours a day, if technically feasible. The Commission shall report to the appropriate Committees of Congress within 30 days after the date of enactment of this Act on how it intends to meet this policy goal.

[7] The ratio of daytime and nighttime interference a station causes to the amount of daytime and nighttime service that the station provides will be used to determine its improvement factor.

daytime interference, would be beaten by an unlimited time facility with only minimal interference improvement. Polnet believes that there should be no arbitrary distinction for ranking purposes between unlimited time and daytime only stations.

47. *Discussion.* We have carefully reviewed the factors chosen in the *Report & Order* to define the ratio that will rank applicants within each preference category. We remain convinced that this carefully crafted formula will permit an equitable selection of migrators to the expanded band and improve service quality in the existing band.

48. The concept of considering net gain or loss in service area would be worthwhile if our objective was to improve the circumstances of those licensees seeking to migrate to a new channel. However, our goal in selecting potential migrators has been to favor those who, by changing frequency, would offer the greatest benefit to those licensees who remain behind in the existing band (535 - 1605 kHz). AFCCE's suggested revision to the adopted improvement factor would disproportionately favor those prospective migrating AM stations who, while not significantly reducing interference to the existing band, would gain large amounts of service area by trading, for example, a relatively low power existing band operation for a higher power expanded band operation. This is inconsistent with our overall interference reduction theme since it does not necessarily effectuate a migration of those stations which cause the most interference and congestion. Further, we believe that AFCCE's proposal, to include the difference between a migrating station's existing and expanded bands' service areas in the numerator and then subsequently dividing by the migrating station's existing service area, effectively double-counts the significance of the existing service area factor and thereby tends to diminish the importance of the interference reduction factor. We do not believe such a double-count is appropriate. Additionally, we note that accurate computation of expanded band service areas presents serious practical problems. It is impossible to precisely compute expanded band service areas until the entire planning process has been finalized since this computation requires knowledge of all the operational details of the expanded band stations, including site locations, and some of these parameters will not be available until the planning and application processes have been completed.

49. We also do not believe that it is appropriate to revise the improvement factor calculations to consider the nighttime improvement that would result from the migration of former Class II-S and III-S facilities that enter the 25% exclusion RSS. Nighttime operations by former Class II-S and III-S facilities are secondary; their permitted power levels were calculated on a non-interfering basis in accordance with the rules in effect at the time they were originally authorized. These power levels were assigned without consideration of coverage or service or whether these operations would experience interference from subsequently authorized facilities. Additionally, these operations are not obligated to comply with the rules governing minimum operating schedules and therefore provision of such service is completely at the licensee's discretion. For these reasons, such services do not warrant inclusion in the improvement factor calculations. We also decline to revise the ranking factor calculation to remove the distinction between unlimited time and daytime only categories because we believe that, wherever possible, a licensee's migrating to the expanded band should produce a net reduction in interference experienced during nighttime hours. We take that position because nighttime is the period subject to the most pervasive reception of undesired signals affecting operation in the AM Band. This is due to the enhanced propagation of skywave signals. Nor do we find compelling reason to favor applications of "immediate" migrators. In effect, such a move would tend to forego greater long term benefits for lesser short term gains. Finally, while operations on 1590 and 1600 kHz do impose some constraints on the use of the expanded band, all assignments, in both the existing and expanded bands, impose constraints upon future assignment flexibility to some degree. Such an imposition of constraints is not, in and of itself, sufficient justification, in our view, to warrant a favored status among applicants for the expanded band channels.

V. AM RECEIVER STANDARDS

50. *Background.* In the *Report and Order,* the Commission declined to set mandatory standards for either AM stereo capability or technical quality of AM receivers.[8] The Commission noted that receiver design involves many tradeoffs among performance, features and cost. Achieving the proper balance among these competing factors is best left to receiver manufacturers and, ultimately, the marketplace. Additionally, the imposition of compulsory standards would likely raise the cost of receivers and eliminate models with which some buyers are presently satisfied. The Commission encouraged receiver manufacturers to market receivers with AM stereo capability as well as NRSC-3 characteristics, on a voluntary basis.

51. *Comments.* Burrow argues that the Commission should direct receiver manufacturers to incorporate expanded band and variable bandwidth I.F. and audio stages in new units. Burrow also maintains that the Commission should require stereo reception capability for automotive and high-end receivers.

52. The EIA opposes Burrow's suggestions stating that Burrow "does not explain the bases for these proposals, nor does he acknowledge, much less attempt to refute, the Commission's stated reasons for relying on marketplace factors to address these matters." EIA goes on to cite interindustry coordination efforts such as the NRSC and joint NAB-EIA AMax certification program as examples of successful voluntary efforts regarding the technical aspects of AM receivers.

53. *Discussion.* We will continue to rely on marketplace factors to determine the characteristics appropriate for AM receivers. Industry is in a much better position than government to ascertain and respond to the consumer demand regarding price, quality and features desirable in an AM receiver. In this regard, we note the progress made toward this end with industry groups such as the NRSC and joint NAB-EIA AMax certification program. No new informa-

[8] Subsequent to release of the *Report and Order* in this proceeding, the Telecommunications Authorization Act of 1992 was enacted. Section 214 of the Authorization Act requires the Commission to adopt a single AM broadcasting stereo transmission standard. *See Notice of Proposed Rulemaking* in ET Docket No. 92-298, adopted December 10, 1992, 8 FCC Rcd 688 (1992).

tion has been submitted that persuades us that our initial decision to let the marketplace set AM receiver standards was incorrect.[9]

VI. TRAVELERS INFORMATION STATIONS

Travelers Information Service Operating Frequency and Technical Standards.

54. *Background.* In the *Report and Order,* the Commission decided to permit Travelers Information Stations (TIS) to operate on any channel in the AM band, on a secondary basis, and adopted co-channel separation criteria in Part 90 of the Rules.

55. *Comments.* NAB opposes TIS operations throughout the AM band, even on a secondary basis, and proposes instead that 530 and 1710 kHz be used. NTIA, having proposed a primary and exclusive allocation to TIS at 1700 kHz during the proceeding, requests that we repeal the newly adopted rules affecting TIS operations and instead use the usual interagency coordination process in order to obtain a mutually acceptable resolution to the issue. NTIA's position on 1700 kHz was supported by petitions from four other TIS interests: AASHTO and the Maryland, Oklahoma and Illinois Departments of Transportation. AASHTO and the Illinois DOT went further and also support the alternative of staying on 1610 kHz, at least for a period of time. NTIA, in its petition, also referred to a new law, "The Intermodal Surface Transportation Efficiency Act of 1991" (Pub. L. No. 102-240, 105 Stat. 1914 (1991,) which refers to the "Intelligent Vehicle Highway System, IVHS." NTIA states that the Federal Highway Administration planned to use 1700 kHz to transmit IVHS messages. CDE proposes that initial assignment of TIS stations be made to specific frequencies such as 530, 1690 and 1700 kHz, with other channels employed only after the first ones are saturated, amounting to a TIS set-aside. Radio Station WBZK-AM suggests that a single frequency be used for TIS operation, although no specific frequency was cited.

56. CDE and dLR also propose that the frequency tolerance for TIS comply with that specified for the AM band (20 Hz compared to current 100 Hz for TIS) in order to minimize interference and that TIS be made generally subject to the same technical standards as AM stations. CDE lays out a comprehensive procedure for accomplishing that end in seven detailed recommendations based upon a worst-case application of the technical standards now proposed for TIS in Part 90. A prominent feature of CDE's proposal is the requirement that the Commission's AM Branch review every TIS application.

57. *Discussion.* Petitioners renew arguments concerning TIS stations that the *Report and Order* already considered and rejected. The *Report and Order* addressed NTIA's argument concerning the dedication of 1700 kHz to TIS, explaining that such an action would not achieve the principal goal of this proceeding, a reduction of interference in the existing AM band. Moreover, our decision to provide multiple channel assignment flexibility for TIS offers new prospects for the growth of the TIS service, as well as imposing minimal impact on existing use of 1610 kHz by the TIS service. Appendix D of the *Report and Order* showed that only four broadcast stations could migrate to 1610 kHz in the Sample Allotment Plan. "The Intermodal Surface Transportation Efficiency Act of 1991" cited by NTIA was not previously considered in this proceeding. Since this law (adopted December 18, 1991) does not address TIS operations as part of the IVHS, its relevance to this proceeding is unclear. Regarding NAB's suggestion to use 530 kHz and 1710 kHz for TIS, we note that 530 kHz is already available for use and that since 1710 kHz is outside of the broadcast band under consideration in this proceeding, it is too late to consider making it available for TIS in this proceeding.[10]

58. CDE's approach to the administration of the TIS would place a substantial paper work burden on the applicants, who currently certify compliance with Part 90, and do not submit detailed engineering exhibits, since TIS licenses are often valid over large areas. We find it unnecessary to impose such a burden on the TIS, since the stations will operate on a secondary basis. Another new issue raised by petitioners is whether we should change the existing 100 Hz frequency tolerance for TIS stations. We acknowledge that unless TIS stations operate with the same frequency tolerance as broadcast stations, there would be a greater potential for interference than assumed by the new co-channel separation requirements. Once again, however, we note that TIS stations will be operating on a secondary basis to broadcasting. Additionally, we understand that typical TIS equipment now in use meets a much higher standard (around 20 Hz). For these reasons, we find that changing the existing frequency tolerance is not necessary.

VII. OTHER MATTERS

59. *Cuban Interference Relief STA's.* Comments were filed by Cox Enterprises, Inc. (Cox), parent company of the licensees of two stations that face similar, though somewhat exceptional, difficulties, WIOD, Miami, Florida and WSUN, St. Petersburg, Florida. Both stations currently operate under separate Special Temporary Authorizations (STA's) to permit increased power levels to compensate for interference received from Cuban stations that were not coordinated under the terms of relevant international notification agreements. Cox cites the persistent nature of the Cuban interference and the substantial expense involved in upgrading each of the affected facilities, and therefore requests that WIOD and WSUN be permanently licensed to operate with those increased facilities.[11]

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[9] At a minimum, AM stereo receivers would be manufactured to conform with the stereo transmission standard adopted in ET Docket 92-298.

[10] We are sensitive to concerns that public reliance on TIS requires that such service not be subject to undue disruption. Therefore, in a future proceeding, we will reexamine the status of travelers' information stations and explore the feasibility of a primary allocation for TIS at 1710 kHz. Federal government TIS operations will continue on 1610 kHz on a co-primary basis until they can be reaccommodated in an orderly fashion on an alternative frequency.

[11] The WIOD and WSUN authorizations, as well as 14 other such STA's, were conditioned on there being no interference to any other valid station assignments. Because of the more restrictive allocation requirements adopted in the *Report and Order,* subsequent renewals of these authorities would likely require the reduction of existing STA power levels to maintain their non-interfering status.

60. We believe that the public interest requires some accommodation to the group of stations which find themselves caught in this situation. Upon demonstration that Cuban interference is still occurring to at least the same degree as it had been when the STA was last renewed, and barring complaints from any of the newly affected stations, we will not require stations operating under the authority of the existing Cuban STA's to modify their present operations to comply with the new technical criteria each time the STA is renewed. Any new requests or modifications of existing STA's will, however, be required to show compliance with the new, more restrictive allocations standards. At such time as the U.S. and Cuba reach agreement regarding their AM broadcast services, these STA's will be cancelled.

61. *Classification of sub-50 kilowatt Class 1 stations.* The AFCCE and Buckley Broadcasting Corporation of California, Inc. (Buckley) sought reconsideration on a change made in the *Report and Order* to Section 73.182(a)(1)(ii) of our rules. Previously, the rules had permitted Class 1-B stations operating within the coterminous 48 states to use power levels as low as 10 kilowatts. Section 73.182(a)(1)(i) as modified in the *Report and Order* now requires all mainland Class A stations to operate with 50 kW, a provision which would ostensibly downgrade those former Class 1-B stations operating with less than 50 kW to Class B status, thereby depriving those operations of the considerably enhanced protection to which former Class 1 and present Class A stations are beneficiary.

62. The vast majority of mainland Class A stations are licensed to operate with 50 kW, a power level best suited for stations intended to provide wide-area service in the most efficient manner. It was not the Commission's intent to diminish protection to any category of AM station; quite the contrary, the goal was to improve protection wherever possible. We now clarify the status of these stations under our revised rules.

63. Those stations listed as Class 1-A and 1-B prior to the *Report and Order* will be classified as Class A stations regardless of their presently licensed power levels. We will update the records for these facilities in the FCC files and data bases to reflect this change. This "grandfathering" treatment shall also apply to any Class A station that in the future decreases its power below the 50 kW level to achieve interference reduction or to obtain authorization to modify its facilities. All shall continue to be classified as Class A unless a power level is used which is below that required to generate a secondary service contour, *i.e.*, a skywave signal of at least 0.5 mV/m for 50% of the time that extends beyond the groundwave service contour.

64. *Directional Antenna Augmentation Requests.* LSC and the AFCCE question changes made in the *Report and Order* to procedures for the filing of directional antenna pattern augmentation requests. Specifically, these commenters ask whether additional tolerance should be permitted at non-monitored azimuths after the analysis of measurement data indicates a radiated field in excess of the permitted value. At those azimuths the *Report and Order* specifies that the allowable augmentation value shall be the measured value in that direction with no additional tolerance. Commenters point to procedures established in Docket No. 21473[12] and observe that the "no-tolerance" approach is inconsistent with the methods used in that docket. They suggest that a 5% tolerance be added in those directions.

65. The Standard Pattern Conversion made in Docket No. 21473 presented general guidelines to be used for the conversion of many hundreds of theoretical patterns into standard and modified standard antenna patterns. Most of these individual conversions required unique administrative manipulation because they defied the application of a simple computerized methodology for processing of these theoretical patterns. Pattern maximum expected operating values (MEOV's), point MEOV's, previously accepted measured patterns that had radiated fields in excess of the theoretical limits, RMS deficiencies, and numerous other anomalous developments created the need for general guidelines and a procedure incorporating a liberal tolerance to treat the largest variety of these situations in the most uniform manner.

66. The focus of our efforts now is concentrated on the concept of AM improvement and reducing the potential for interference within the band rather than accommodating a large number of difficult-to-adjust antenna systems. Thus, there is little justification for applying procedures that were never intended for use beyond the initial pattern conversion project and will not achieve an improved AM service. Augmentation is not a process that was conceived to permit unjustified pattern relaxation routinely. It is to be a last resort after all other design and adjustment techniques have failed, serving in effect as a pattern "blow-out patch", which should be used only in rare cases where there is an unforeseen standard pattern shortcoming. Therefore, we deny petitioners' request; the text of Section 73.152 will remain as stated in the *Report and Order*.

67. *Class B Power Restrictions Imposed by NARBA.* LSC and dLR raise concerns about limitations placed on Class B (formerly Class III) stations wishing to increase power above 5 kW but restricted by North American Regional Broadcasting Agreement (NARBA) requirements pertaining to this country, the Bahamas Islands and the Dominican Republic. These limitations prohibit power levels beyond 5 kW on the former Class III frequencies. Petitioners argue that Class B stations that may otherwise qualify for power increases will be precluded from increasing power by Section 73.1650, which requires consideration of all binding international agreements, including NARBA. They urge the Commission to consider these situations on a case by case basis.

68. The Commission has been working with the Dominican Republic and the Bahamas for a substantial time in an effort to replace the NARBA requirements. Further discussions are to be held in the months ahead. Until an agreement can be reached terminating the NARBA, we will use the Note to Section 73.21(b) as a guideline. If a situation warrants, we will consider grant of an application which falls in this category, on a case by case basis, subject to appropriate conditions, in accordance with the provisions of Section 73.23(b).

69. *Night Power for Class D Stations.* In response to the AFCCE petition, we clarify that the calculation of permissible night power for Class D stations specified in section

[12] 84 FCC Rcd 796 (1981).

73.99(f)(7) will employ a 25% exclusion, since such stations can be classified as "low" interferers. The rule will be corrected to read as follows:

> "(7) For protection purposes, the nighttime 25% RSS limit will be used in the determination of maximum permissible power."

VIII. ADMINISTRATIVE MATTERS

70. *Processing Procedures.* The *Report and Order* stated that, upon lifting of the freeze on AM applications, new applications must comply with the new technical standards. Applications currently on file that have been "cut-off" were not required to amend. All others were given sixty days from the effective date of the *Report and Order* to file amendments to satisfy the requirements of the revised rules.

71. In a petition for reconsideration, Romar Communications, Inc. notes that it filed an application for a new AM station in Lansing, N.Y. before the AM freeze went into effect. That application was returned as defective and Romar subsequently (after the freeze took effect) refiled an amended application and a request for acceptance *nunc pro tunc*. The latter was opposed and remains pending. The application has not, therefore, been "cut off." Romar argues that, because it would not be able to amend its refiled application in a satisfactory manner, it would be inequitable to apply the new rules to that application, which was originally filed to meet old technical standards. Petitioner asks that the *Report and Order* be revised so that the new technical standards will not apply to applications with a status similar to its Lansing application.

72. We deny Romar's request. We continue to believe that the necessity for definitive processing line procedures requires that the new technical rules be applied in the manner specified in the *Report and Order*.

73. For the sake of clarification, we repeat here the corrections and clarifications that were made to the *Report and Order* released on October 25, 1991 prior to its publication in the Federal Register on December 12, 1991.[13]

In the note which follows Section 73.25 (b) the value of 4 microV/m was erroneously specified, it has been corrected to read 5 microV/m.

To footnote 1 which follows the Table at the end of Section 73.182 (q), the following sentence was added to clarify what had been an ambiguous meaning of the applicability of the footnote:

> "This note does not apply to Class C stations; or to the protection of Class A stations which are normally protected on a single signal non-RSS basis."

The value used in Section 73.185 (d) for the upper bracket angle was corrected to read "16.6 degrees" and not "16.3 degrees" as had been stated in the *Report*.

The instructions preceding the revisions made to Section 73.190 were corrected to indicate that new Figures 7 and 8 were being included.

To clarify the use of the pertinent formula 73.190 (b) Note (3) was corrected to read:

> In equation (7), k = -1 for west to east paths (i.e., br > bt), otherwise k = 1.

Section 90.242 (a) was corrected to reflect the determinations made in the *Report* to read:

> The frequencies 530 through 1700 kHz in 10 kHz increments may be assigned to the Local Government Radio Service for the operation of Travelers Information Stations subject to the following conditions and limitations.

The *Report and Order* was corrected in Paragraph 216 to show that the lifting of the freeze on AM applications will pertain to not only major change applications but to all types of modification applications; accordingly, the word "major" was stricken from the text of the second sentence of Paragraph 216.

74. The only other changes made to the version of the *Report* that appeared in the Federal Register involved the Ordering Clauses (Par. Nos. 220, 221 and 222 of the *Report)*. These corrections were effected to indicate that, in addition to Part 73, 47 CFR Part 2 and Part 90 had been amended; and also to indicate the effective dates of the amended rules, application forms, and the removal of the application filing freeze.

IX. REGULATORY FLEXIBILITY ACT

75. Pursuant to the Regulatory Flexibility Act of 1980, the Commission included a final analysis in the *Report and Order* detailing (i) the need for and purpose of the rules, (ii) the summary of issues raised by public comment in response to the initial regulatory flexibility analysis, Commission assessment, and changes made as a result, and (iii) significant alternatives considered and rejected. The petitions for reconsideration have triggered no substantive changes to the earlier decision and consequently to that final analysis.

X. ORDERING CLAUSES

76. Accordingly, IT IS ORDERED that the petitions for reconsideration filed in this proceeding ARE GRANTED to the extent indicated herein and are otherwise DENIED.

77. IT IS FURTHER ORDERED that pursuant to authority contained in Sections 4 (i), 301, 303(b), (f), (g), (i), and (j), 307(d), 308(a), 310, 312, 313, 314 and 331(b) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 4(i) 301, 303(b), (f), (g), (i), and (j), 307(d), 308(a), 310, 312, 313, 314 and 331(b), Part 73 of the Commission's rules and regulations, 47 CFR Part 73, IS AMENDED as set forth in the attached Appendix B. The rules will go into effect 30 days after publication of this *Memorandum Opinion and Order* in the Federal Register.

78. For further information, contact Larry Olson, (202) 254-3394, Policy and Rules Division, Mass Media Bureau.

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[13] 56 FR 239.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

AM PETITIONS FOR RECONSIDERATION

1) COHEN, DIPPELL AND EVERIST, P.C. (CDE)

2) R. MORGAN BURROW, JR.

3) JEFFREY N. EUSTIS

4) DENNIS JACKSON (RADIO STATION WREF)

5) THE OKLAHOMA DEPARTMENT OF TRANSPORTATION

6) RADIO ELIZABETH, INC. (RADIO STATION WJDM, ELIZABETH, NJ)

7) POLNET BROADCASTING COMPANY, LTD. (RADIO STATION WKTA, EVANSTON IL)

8) ROMAR COMMUNICATIONS, INC.

9) THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE (NAACP)

10) NATIONAL ASSOCIATION OF BROADCASTERS (NAB)

11) ASSOCIATION OF FEDERAL COMMUNICATIONS CONSULTING ENGINEERS (AFCCE)

12) THE NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION (NTIA)

13) BURKHARDT MONITORING SERVICE

14) LAHM, SUFFA & CAVELL, INC. (LSC)

15) BUCKLEY BROADCASTING CORPORATION OF CALIFORNIA, INC. (BUCKLEY)

16) LARRY S. TSCHIRHART

17) DUTREIL, LUNDIN & RACKLEY, INC. (dLR)

18) THE MARYLAND DEPARTMENT OF TRANSPORTATION (MDOT)

19) THE AMERICAN ASSOCIATION OF STATE HIGHWAY AND TRANSPORTATION OFFICALS (AASHTO)

20) EDWARD SCHOBER, P.E.

21) JOHN R. FURR late filed

22) ILLINOIS DEPARTMENT OF TRANSPORTATION late filed

APPENDIX B

COMMENTS FILED IN RESPONSE TO THE PETITIONS FOR RECONSIDERATION

1) DUTREIL, LUNDIN AND RACKLEY, INC (dLR)

2) ELECTRONICS INDUSTRY ASSOCIATION (EIA)

3) NATIONAL ASSOC. OF BROADCASTERS (NAB)

4) RADIO AIDS, INC

5) LOUIS A. WILLIAMS, JR.

6) GEORGE BRADSHAW, SCAN COMMUNICATIONS

7) HEIMERL & ASSOCIATES

8) COX ENTERPRISES, INC

9) NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION (NTIA)

10) RADIO TEN CORPORATION, RADIO STATION WCMX

11) COMMERCIAL RADIO MONITORING COMPANY (CRMC)

12) JEFFREY N. EUSTIS

13) DELTA ELECTRONICS, INC.

14) RADIO STATION WBZK-AM late filed

15) DAVID W. SCHMIDT late filed

CONCURRING STATEMENT OF COMMISSIONER ANDREW C. BARRETT

RE: Review of Technical Assignment Criteria for the AM Broadcast

At the time of our Report and Order in this proceeding, I concurred in this item because of its failure to adequately address my concerns regarding the impact on small radio station businesses, including those who are minority owned.[1] I felt the decision was inequitable then with respect to these entities. I continue to believe that is the case in this subsequent order. It is not surprising to me that the Commission finds equitable reasons, as a matter of law or policy, to modify our prior Order and allow certain entities priority status in the expanded band where: 1. AM daytime-only stations in communities of more than 100,000 and within a Class I station primary service area seek to provide full-time, 24-hour service[2]; and 2. Travelers Information Stations seek to operate on a primary status within the AM expanded band[3]. The Order finds that such actions are likely to have a deminimis impact on our goal of reducing interference. It also acknowledges that other public interest concerns can be considered beyond interference reduction with respect to expanded band allotments. Thus, I am surprised that this Order selectively carves out these concerns while rejecting others with similar merit. Our decision to deny opportunities for Class C licensees to migrate to the expanded band is inequitable. Our decision to reject some type of priority allocation for all AM daytime only stations and minority-owned AM stations[4] in a portion of the expanded band also continues to be inequitable. I believe that arguments on reconsideration justify granting these various entities equal priority in the reallocation of at least a portion of the AM expanded band. To selectively support public interest concerns for certain entities in the expanded band, yet reject small business and

minority ownership concerns despite statistical evidence that supports more equitable treatment, is an arbitrary exercise in regulatory linedrawing. Thus, I concur.

FOOTNOTES

[1] See, Concurring Statement of Commissioner Andrew C. Barrett, Report and Order, Sept. 26, 1991.

[2] See Order at 12.

[3] See Order at 16.

[4] An NTIA study during the past year shows that minority ownership statistics in broadcasting continue to be abysmal. Our efforts to address minority ownership issues in the context of the revised radio rules also have not yielded significant improvements in minority ownership. If anything, small broadcasters, including most minorities, appear to be struggling to compete with the consolidation among larger group owners. Thus, in the context of trends over the last decade, minority ownership in broadcasting is continuing to decline, not improve.

Concurring Statement of
Commissioner Andrew C. Barrett

RE: Review of Technical Assignment Criteria for the AM Broadcast Service

At the time of our Report and Order in this proceeding, I concurred in this item because of its failure to adequately address my concerns regarding the impact on small radio station businesses, including those who are minority owned.[1] I felt the decision was inequitable then with respect to these entities. I continue to believe that is the case in this subsequent order. It is not surprising to me that the Commission finds equitable reasons, as a matter of law or policy, to modify our prior Order and allow certain entities priority status in the expanded band where: 1. AM daytime-only stations in communities of more than 100,000 and within a Class I station primary service area seek to provide full-time, 24-hour service[2]; and 2. Travelers Information Stations seek to operate on a primary status within the AM expanded band[3]. The Order finds that such actions are likely to have a deminimis impact on our goal of reducing interference. It also acknowledges that other public interest concerns can be considered beyond interference reduction with respect to expanded band allotments. Thus, I am surprised that this Order selectively carves out these concerns while rejecting others with similar merit. Our decision to deny opportunities for Class C licensees to migrate to the expanded band is inequitable. Our decision to reject some type of priority allocation for all AM daytime only stations and minority-owned AM stations[4] in a portion of the expanded band also continues to be inequitable. I believe that arguments on reconsideration justify granting these various entities equal priority in the reallocation of at least a portion of the AM expanded band. To selectively support public interest concerns for certain entities in the expanded band, yet

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[1] See, Concurring Statement of Commissioner Andrew C. Barrett, Report and Order, Sept. 26, 1991.

[2] See Order at 12.

[3] See order at 16.

[4] An NTIA study during the past year shows that minority ownership statistics in broadcasting continue to be abysmal. Our efforts to address minority ownership issues in the context of the revised radio rules also have not yielded significant improvements in minority ownership. If anything, small broadcasters, including most minorities, appear to be struggling to compete with the consolidation among larger group owners. Thus, in the context of trends over the last decade, minority ownership in broadcasting is continuing to decline, not improve.

reject small business and minority ownership concerns despite statistical evidence that supports more equitable treatment, is an arbitrary exercise in regulatory linedrawing. Thus, I concur.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: May 4, 1993

FEE DECISIONS OF THE MANAGING DIRECTOR AVAILABLE TO THE PUBLIC

The Managing Director is responsible for fee decisions in response to requests for waiver or deferral of fees as well as other pleadings associated with the fee collection process. On a monthly basis, a public notice is released and the entire text of these fee decisions is published in the FCC Record.

The decisions are placed in General Docket 86-285 and are available for public inspection. A copy of the decision is also placed in the appropriate docket, if one exists.

The following Managing Director fee decisions are released for public information:

Armak Broadcasters, Inc. - Request for refund of a hearing fee for a new FM station at Castle Rock, Washington - **Granted** (March 26, 1993).

Coberly(formerly Woods), Jamie Leigh - Request for refund of a hearing fee for a new FM radio broadcast station at Rosamond, California - **Granted** (March 26, 1993).

Crown Broadcasting Company - Request for refund of a hearing fee for a new FM station at New Sharon, Iowa - **Granted** (March 26, 1993).

Equal Time Broadcasting - Request for refund of a hearing fee for a new FM station at Ocean City, Maryland - **Granted** (March 26, 1993).

Flintstone Community Television, Inc. - Request for waiver of filing fees for three translator stations at Flintstone, Maryland - **Denied** (April 6, 1993).

G & M Communications - Request for refund of a hearing fee for a new FM radio broadcast station at Bucksport, South Carolina - **Granted** (April 1, 1993).

Giannettino, John M. - Request for refund of a hearing fee for a new FM station in Burlington, Iowa - **Granted** (March 30, 1993).

J. B. Broadcasting, Inc. - Request for refund of a hearing fee for a new FM station at Patterson, California - **Granted** (March 26, 1993).

LD Broadcasting LP - Request for refund of a hearing fee for a new FM station at Manahawkin, New Jersey - **Granted** (April 13, 1993).

Multi-Micro's F Group - Request for refund of fee overpayment for a MMDS facility in Evansville, Indiana - **Granted** (April 12, 1993).

RBM Broadcasting, Inc. - Request for refund of a hearing fee for a station at Lake Ozark, Missouri - **Granted** (April 6, 1993).

Robinson, Russ - Request for refund of a hearing fee for a new FM station at Richwood, Louisiana - **Granted** (March 30, 1993).

SBM Communications - Request for refund of the filing fee for a new FM station at Marathon, Florida - **Granted** (April 6, 1993).

Scott, Jeffery - Request for refund of a hearing fee for a new FM station a Bethany Beach, Delaware - **Granted** (March 30, 1993).

NOTE: ANY QUESTIONS REGARDING THIS REPORT SHOULD BE DIRECTED TO THE PREPARER, CLAUDETTE PRIDE, CHIEF, FEE SECTION ON (202) 632-0241.

FEDERAL COMMUNICATIONS COMMISSION

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

MAR 26 1993

David Tillotson, Esq.
3421 M Street, N.W.
Suite 1739
Washington, D.C. 20007

Dear Mr. Tillotson:

This will respond to your request for refund of a hearing fee filed on behalf of Armak Broadcasters, Inc. ("Armak") in connection with its construction permit application for a new FM station at Castle Rock, Washington.

You state, and our records reflect, that the other mutually exclusive applicant failed to submit its hearing fee. Therefore, the need for a comparative hearing has been obviated.

Section 1.1111 (b)(1) of the Commission's rules provides for a refund of a hearing fee whenever an application is granted without being designated for hearing. Since Armak's application will be disposed of without a hearing, refund of the hearing fee is appropriate.

Accordingly, your request is granted. A check, made payable to the maker of the original check and drawn in the amount of $6,760.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

MAR 26 1993

OFFICE OF
MANAGING DIRECTOR

Arthur V. Belendiuk, Esq.
Smithwick & Belendiuk
1990 M Street, N.W.
Suite 510
Washington, D.C. 20036

Dear Mr. Belendiuk:

This is in response to your request for refund of hearing fee submitted on behalf of Jamie Leigh Coberly (Coberly), applicant for a new FM radio broadcast station at Rosamond, California.

You state that Coberly tendered a hearing fee in the amount of $6,760. You have requested a refund because Coberly's application was dismissed pursuant to a settlement agreement that was filed by the Notice of Appearance deadline. Because Coberly participated in a timely filed agreement that resulted in settlement of this proceeding, the hearing fee may be returned. See 47 C.F.R. Section 1.1111(b)(4).

Accordingly, a check for $6,760, payable to the maker of the original check, will be forwarded to you at the earliest practicable time. If you have any questions about this refund, please call Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

MAR 26 1993

OFFICE OF
MANAGING DIRECTOR

Peter Gutmann, Esq.
Pepper & Corazzini
1776 K Street, N.W.
Washington, D.C. 20006

Dear Mr. Gutmann:

This will respond to your request for refund of a hearing fee filed on behalf of Crown Broadcasting Company ("Crown") in connection with its construction permit application for a new FM station at New Sharon, Iowa.

You state, and your documentation shows, that the other mutually exclusive applicant was dismissed for failure to file its hearing fee. Therefore, the need for a comparative hearing has been obviated.

Section 1.1111 (b)(3) of the Commission's rules provides for a refund of a hearing fee whenever an application is granted without being designated for hearing. Since Crown's application will be disposed of without a hearing, refund of the hearing fee is appropriate.

Accordingly, your request is granted. A check, made payable to the maker of the original check and drawn in the amount of $6,760.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

MAR 26 1993

OFFICE OF
MANAGING DIRECTOR

Michael J. Wilhelm, Esq.
1350 Connecticut Avenue, N.W.
Suite 905
Washington, D.C. 20036

Dear Mr. Wilhelm:

This will respond to your request for refund of a hearing fee filed on behalf of Equal Time Broadcasting ("Equal Time") in connection with its construction permit application for a new FM station at Ocean City, Maryland.

You state, and our records reflect, that Equal Time paid the hearing fee, but voluntarily dismissed its application by not filing a Notice of Appearance. Under the circumstances, since Equal Time voluntarily dismissed its application and was not designated for hearing, refund of the hearing fee is appropriate. See 47 C.F.R. §1.1111 (b)(2); see also Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases, 6 FCC Rcd 157, 158 (1990).

Accordingly, your request is granted. A check, made payable to the maker of the original check and drawn in the amount of $6,760.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

APR 6 1993

Ms. Betty L. Willison
Secretary-Treasurer
Flintstone Community
Television, Inc.
Route 1, Box 44-A
Flintstone, Maryland 21530

Dear Ms. Willison:

This is in response to your request for waiver of the filing fees for the renewal applications for translator stations W08BN, W13AD, and W11AK operated by Flintstone Community Television, Inc. (Flintstone) which you enclosed with your waiver request.

You state that in March, 1989 the Commission granted your waiver request and refunded $90.00 in connection with the previous renewal applications for these stations, and that you are presently requesting a continuation of that waiver. Unfortunately, the Commission's Rules do not provide for continuation of a waiver of fees previously granted. Section 1.1115(e) of the Commission's Rules specifically states that "Applicants seeking waivers must submit the request for waiver with the application or filing, required fee and FCC Form 155." 47 U.S.C. § 1.1115(e).

Therefore, we are returning your renewal applications and your request for waiver. Please resubmit the applications with a separate fee and FCC Form 155 for each application along with your request for waiver and refund of the filing fees. We are enclosing a copy of FCC Form 155 <u>for each application</u> and a fee filing guide that, on page 5, provides the mailing address for your submission and the fee code you will need in order to fill out FCC Form 155.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

APR 1 1993

OFFICE OF
MANAGING DIRECTOR

Gary S. Smithwick, Esq.
Smithwick & Belendiuk, P.C.
1990 M. Street, N.W.
Suite 510
Washington, D.C. 20036

Dear Mr. Smithwick:

This is in response to your Request for Refund of Hearing Fee submitted on behalf of G&M Communications (G&M), applicant for a new FM radio broadcast station at Bucksport, South Carolina (File No. BPH-920402MH).

You state that G&M paid its hearing fee on September 10, 1992. You also state that on October 15, 1992, G&M and the remaining mutually exclusive applicant in this proceeding filed a Joint Request for Approval of Settlement Agreement, which contemplated dismissal of the other applicant and grant of G&M's application. You further state that the applications have not yet been designated for hearing, and request that G&M's hearing fee be returned.

By letter (1800B3-JR) of March 19, 1993, the Chief, Audio Services Division dismissed the Joint Request and granted G&M's application. Because the Commission's rules provide for refund of the hearing fee paid by broadcast applicants in those cases where the application is granted without being designated for hearing, G&M's hearing fee will be refunded. 47 C.F.R. § 1.1111(b)(1).

Accordingly, your request for refund of the hearing fee is granted. A check for $6,760, payable to the maker of the original check, will be forwarded to you at the earliest practicable time. If you have any questions about this refund, please call the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

MAR 30 1993

IN REPLY REFER TO:

David D. Oxenford, Esq.
Fisher, Wayland, Cooper and Leader
1255 Twenty-third Street, N.W.
Suite 800
Washington, D.C. 20037-1170

Re: Application of John M. Giannettino
Burlington, Iowa
File No. BPH 910719 MA

Dear Mr. Oxenford:

This is in response to your request for refund of the fee submitted in the above-referenced matter.

Your request is granted. We have reviewed the facts surrounding your filing and have concluded that a refund is warranted pursuant to Section 1.1111 of the Commission's rules. 47 C.F.R. § 1.1111. The subsection checked below is specifically applicable to your request.

____ No fee is required for the above referenced submission (§1.1111(a)(1)).

____ An insufficient fee has been submitted with the application/filing (§1.1111(a)(2)).

____ The applicant cannot fulfil the prescribed age requirement (§1.1111(a)(3)).

____ The Commission has adopted a new rule that has nullified the application after its acceptance for filing (§1.1111(a)(4)).

____ A new law or treaty has rendered useless a grant or other positive disposition of the application (§1.1111(a)(4)).

____ The application was not timely filed in accordance with the filing window as established by the Commission (§1.1111(6)).

____ In the case of a broadcast applicant, the application was granted without being designated for hearing (§1.1111(b)(1)).

____ In the case of a broadcast applicant, the application was dismissed prior to designation for hearing or in the order

designating the case for hearing (§1.1111(b)(2)).

____ In the case of a broadcast applicant, the application was dismissed for failure to file a Notice of Appearance (§1.1111(b)(2)).

____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding to file a Notice of Appearance and the application was immediately grantable (§1.1111(b)(3)).

____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding who filed a Notice of Appearance and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)(3)).

____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for the dismissal of all but one application, and that application was immediately grantable (§1.1111(b)(4)).

__X__ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for dismissal of all but one application and that application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)(4)).

A check, made payable to maker of the original check and drawn in the amount of $6,760.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

MAR 26 1993

OFFICE OF
MANAGING DIRECTOR

Peter A. Casciato, Esq.
1500 Sansome Street, Suite 201
San Francisco, California 94111

Dear Mr. Casciato:

This will respond to your request for refund of a hearing fee filed on behalf of J. B. Broadcasting, Inc., in connection with its construction permit application for a new FM station at Patterson, California.

You state that prior to designation for hearing, J. B. Broadcasting, Inc. entered into settlement agreement with the remaining mutually exclusive applicants. The settlement agreement was approved, the mutually exclusive applications were dismissed, and the matter was not designated for hearing. Under the circumstances, refund of the hearing fee is appropriate. See 47 C.F.R. §1.1111(b)(4); see also Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases, 6 FCC Rcd 157, 158 (1990).

Accordingly, your request is granted. A check, made payable to the maker of the original check and drawn in the amount of $6,760.00 will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

APR 13 1993

Dan J. Alpert, Esq.
1250 Connecticut Avenue, N.W.
7th Floor
Washington, D.C. 20036-2603

Dear Mr. Alpert:

This will respond to your request for refund of hearing fee filed on behalf of LD Broadcasting Limited Partnership ("LD") in connection with its construction permit application for a new FM station at Manahawkin, New Jersey.

You have requested a refund because, prior to designation for hearing, LD entered into a settlement agreement and voluntarily dismissed its application. Section 1.1111(b)(2) of the Commission's rules provides for refund of a hearing fee when an application is voluntarily dismissed prior to designation for hearing. Since the request for dismissal was timely filed, refund of the hearing fee is appropriate.

Accordingly, your request is granted. A check, made payable to the maker of the original check and drawn in the amount of $6,760.00 will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

Gerald Stevens-Kittner, Esq.
Arter & Hadden
1801 K Street, N.W.
Suite 400K
Washington, D.C. 20006-1301

Dear Mr. Stevens-Kittner:

This is in response to your request for refund of fee overpayment submitted on behalf of Multi-Micro's F Group MMDS facility in Evansville, Indiana.

You state that Multi-Micro tendered a fee of $620.00 in connection with its major modification application, when in fact the correct fee is $155.00. See 47 C.F.R. § 1.1105.7(b). You now request refund of the $465.00 overpayment.

Your request for refund of fee overpayment will be granted as the amount in question is $8.00 or more. See 47 C.F.R. § 1.1111(a)(5) "Note." Accordingly, a check for $465.00, payable to the maker of the original check, will be forwarded to you at the earliest practicable time. If you have any questions about this refund, please call the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

APR 06 1993

OFFICE OF
MANAGING DIRECTOR

Richard R. Zaragoza, Esquire
Fisher, Wayland, Cooper and Leader
1255 Twenty-Third Street, N.W.
Suite 800
Washington, D.C. 20037-1170

Re: RBM Broadcasting, Inc.
Lake Ozark, Missouri
9211028170398006

Dear Mr. Zaragoza:

This is in response to your request for refund of the fee submitted in the above-referenced matter.

Your request is granted. We have reviewed the facts surrounding your filing and have concluded that a refund is warranted pursuant to Section 1.1111 of the Commission's rules. 47 C.F.R. § 1.1111. The subsection checked below is specifically applicable to your request.

____ No fee is required for the above referenced submission (§1.1111(a)(1)).

____ An insufficient fee has been submitted with the application/filing (§1.1111(a)(2)).

____ The applicant cannot fulfil the prescribed age requirement (§1.1111(a)(3)).

____ The Commission has adopted a new rule that has nullified the application after its acceptance for filing (§1.1111(a)(4)).

____ A new law or treaty has rendered useless a grant or other positive disposition of the application (§1.1111(a)(4)).

____ The application was not timely filed in accordance with the filing window as established by the Commission (§1.1111(6)).

____ In the case of a broadcast applicant, the application was granted without being designated for hearing (§1.1111(b)(1)).

__X__ In the case of a broadcast applicant, the application was dismissed prior to designation for hearing or in the order designating the case for hearing (§1.1111(b)(2)).

____ In the case of a broadcast applicant, the application was dismissed for failure to file a Notice of Appearance (§1.1111(b)(2)).

____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding to file a Notice of Appearance and the application was immediately grantable (§1.1111(b)(3)).

____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding who filed a Notice of Appearance and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)(3)).

____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for the dismissal of all but the above-referenced application, and the application was immediately grantable (§1.1111(b)(4)).

____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for dismissal of all but the above-referenced application and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)(4)).

A check, made payable to maker of the original check and drawn in the amount of $6,760.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

MAR 31 1993

Shaun A. Maher, Esq.
Blair, Joyce & Silva
1825 K Street, N.W.
Suite 510
Washington, D.C. 20554

Dear Mr. Maher:

This will respond to your request for refund of a hearing fee filed on behalf of Russ Robinson in connection with his construction permit application for a new FM station at Richwood, Louisiana.

You state, and our records reflect, that prior to the Notice of Appearance deadline, Russ Robinson filed a settlement agreement with the other mutually exclusive applicant. The settlement agreement has been approved, the environmental issue against Russ Robinson has been deleted, and his application has been granted without hearing. Under the circumstances, refund of Russ Robinson's hearing fee is appropriate. See 47 C.F.R. §1.1111(b)(4).

Accordingly, your request is granted. A check, made payable to the maker of the original check and drawn in the amount of $6,760.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

Gary S. Smithwick, Esq.
Smithwick & Belendiuk
1990 M Street, N.W.
Suite 510
Washington, D.C. 20036

Dear Mr. Smithwick:

This will respond to your request for refund of a filing fee filed on behalf of SBM Communications ("SBM") in connection with its construction permit application for a new FM station at Marathon, Florida.

You state, and our records reflect, that SBM withdrew its application within fifteen days of the issuance of the Public Notice, which announced that there was a previously filed application for the same vacant channel. Under the circumstances, refund of SBM's filing fee is appropriate. See 47 C.F.R. §1.1111(c).

Accordingly, your request is granted. A check, made payable to the maker of the original check and drawn in the amount of $2,030.00 will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

MAR 30 1993

IN REPLY REFER TO:

Dennis P. Corbett, Esq.
Leventhal, Senter & Lerman
2000 K St., N.W.
Suite 600
Washington, D.C. 20006

Re: Application of Jeffery Scott
Bethany Beach, DE
File No. BPH 910213 ME

Dear Mr. Corbett:

This is in response to your request for refund of the fee submitted in the above-referenced matter.

Your request is granted. We have reviewed the facts surrounding your filing and have concluded that a refund is warranted pursuant to Section 1.1111 of the Commission's rules. 47 C.F.R. § 1.1111. The subsection checked below is specifically applicable to your request.

____ No fee is required for the above referenced submission (§1.1111(a)(1)).

____ An insufficient fee has been submitted with the application/filing (§1.1111(a)(2)).

____ The applicant cannot fulfil the prescribed age requirement (§1.1111(a)(3)).

____ The Commission has adopted a new rule that has nullified the application after its acceptance for filing (§1.1111(a)(4)).

____ A new law or treaty has rendered useless a grant or other positive disposition of the application (§1.1111(a)(4)).

____ The application was not timely filed in accordance with the filing window as established by the Commission (§1.1111(6)).

____ In the case of a broadcast applicant, the application was granted without being designated for hearing (§1.1111(b)(1)).

____ In the case of a broadcast applicant, the application was dismissed prior to designation for hearing or in the order

designating the case for hearing (§1.1111(b)(2)).

____ In the case of a broadcast applicant, the application was dismissed for failure to file a Notice of Appearance (§1.1111(b)(2)).

____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding to file a Notice of Appearance and the application was immediately grantable (§1.1111(b)(3)).

____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding who filed a Notice of Appearance and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)(3)).

____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for the dismissal of all but one application, and that application was immediately grantable (§1.1111(b)(4)).

__X__ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for dismissal of all but one application and that application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)(4)).

A check, made payable to maker of the original check and drawn in the amount of $6,760.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 93-179

In the matter of	)	
	)	
Evaluation of the Syndication and Financial Interest Rules	)	MM Docket No. 90-162
	)	

SECOND REPORT AND ORDER

Adopted: April 1, 1993 Released: May 7, 1993

By the Commission: Chairman Quello voting in favor, concurring in part and issuing a separate statement; Commissioner Marshall not participating; Commissioner Barrett issuing a separate statement; Commissioner Duggan dissenting in part and issuing a separate statement.

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I. Introduction

1. In this Second Report and Order (Second R&O), the Commission amends its financial interest and syndication ("finsyn") rules, following the decision of the United States Court of Appeals for the Seventh Circuit ("Court" or "Seventh Circuit") in Schurz Communications v. FCC (Schurz), 982 F.2d 1043 (7th Cir. 1992). That decision vacated our 1991 Report and Order

(R&O) relaxing and modifying these rules[1] and returned the matter to us for further proceedings. Accordingly, we sought additional public comment on the issues cited in the Court's decision. After due deliberation and review of the record, the Court's opinion and ongoing changes in the broadcast television program production and syndication marketplace, we have decided to:

(a) Remove all restrictions on network acquisition of financial interests and syndication rights in network programming (except for certain reporting requirements).

(b) Eliminate the 40 percent cap on network in-house productions.

(c) Extend the prohibition on active network syndication to all domestic syndication, regardless of whether a network has produced the program in-house or acquired it from an outside producer.

(d) Eliminate affiliate favoritism restraints as a result of the complete ban on active domestic syndication.

(e) Retain the rule prohibiting warehousing.[2]

(f) Retain the 1991 restrictions on first-run domestically syndicated programming. Thus, for the domestic market, networks are permitted to own financial interests and syndication rights in first-run syndicated programming produced solely in-house, subject to the ban on active domestic syndication, and networks continue to be prohibited from acquiring any interests in or right to syndicate other first-run syndicated productions in the United States.

(g) Continue to permit, without restriction, network purchase of foreign syndication rights in, including active syndication of, off-network programming distributed outside the United States and first-run programming distributed solely outside the United States. Continue to permit network purchase of foreign syndication rights in, including active syndication of, first-run programming in foreign markets even if the program is also distributed domestically, so long as the network has produced the programming solely in-house.

(h) Continue to permit, without restriction, network ownership and syndication of all non-prime time network programming and all

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1 See Report and Order in MM Docket No. 90-162, 6 FCC Rcd 3094, as modified, Memorandum Opinion and Order (MO&O), 7 FCC Rcd 345 (1991).

2 We initially determined to eliminate the anti-warehousing rule. However, for the reasons set forth below, Section III.B., on May 6, 1993, we reconsidered this matter on our own motion and decided to retain the rule. See 47 C.F.R. § 1.108.

non-entertainment network programming (whether prime time or not).

(i) Modify the reporting requirements to comport with the actions taken in this decision.

(j) Exempt emerging networks from all restrictions, except reporting requirements, which are required once an emerging network provides 16 hours of prime time programming per week to interconnected affiliates.

(k) Eliminate these remaining finsyn restrictions two years after the entry of an order by the U.S. District Court, Central District of California ("District Court"), granting the networks' motions to modify certain restrictions of the consent decrees that now limit their participation in the financial interest and syndication areas.[3] These consent decree restrictions essentially replicate the Commission's 1970 finsyn rules. The Commission shall launch a review of the market effect of the changes in the finsyn and consent decree restrictions by the Commission and the District Court eighteen months after the entry of such an order by the District Court. The burden of proof in this review will be placed on those who seek to retain any of the remaining finsyn restrictions. Six months after commencement of this review, proponents of any remaining finsyn restrictions must persuade the Commission that further retention is justified, or the remaining rules will automatically sunset.

2. As discussed below, we believe that the changes adopted in this Second R&O comport more accurately with the weight of the evidence presented in this proceeding, address the concerns cited by the Seventh Circuit in Schurz, and constitute the best approach for furthering our goals of diversity and competition.

II. Background

3. The 1991 Rules. The FCC orginally adopted the financial interest and syndication rules in 1970 to limit network control over television programming and thereby encourage the development of a diversity of programs

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[3] See United States v. National Broadcasting Co., 449 F.Supp. 1127 (C.D. Calif. 1978), aff'd, 603 F.2d 227 (9th Cir. 1979) (table), cert. denied, 444 U.S. 991 (1979); United States v. CBS, Inc., 45 Fed. Reg. 34464 (1980); United States v. American Broadcasting Companies, 45 Fed. Reg. 58411 (1980). The networks have filed motions, supported by the Department of Justice and under consideration by the District Court, to lift the restrictions of Sections IV and VI(A) of the consent decrees. While these Sections essentially replicate the Commission's 1970 finsyn rules, other provisions of the decrees, not subject to the networks' motions but with automatic expiration dates, further restrict network behavior in the programming marketplace. For further discussion, see infra note 106.

through diverse and antagonistic sources of program services.[4] Over twenty years later, after extensive notice and comment rulemaking proceedings and an en banc hearing, the Commission, in 1991, decided to relax, but not totally repeal, the 1970 finsyn rules. In 1991, a Commission majority determined that the networks faced greater competition in the media marketplace, but still retained an ability to manipulate the prime time entertainment and first-run programming market to the detriment of program source and outlet diversity. Consequently, the Commission decided that it was still necessary to impose modified restraints on network acquisition of financial interests in programming and on network syndication activities.

4. Specifically, the 1991 R&O: (1) eliminated restrictions on network ownership and syndication of all non-prime time network programming and all non-entertainment network programming (whether prime time or not); (2) allowed networks to retain financial interests and passive syndication rights in "in-house" productions aired on their own or another network, subject to certain procedural safeguards; (3) permitted networks to fill up to, but no more than, 40 percent of their prime time entertainment schedule with "in-house" productions; (4) allowed networks to acquire financial interests and passive domestic syndication rights in outside productions aired on a network, subject to a thirty-day, two-step negotiations separation safeguard; (5) allowed networks, without limitation, to acquire foreign syndication rights in any network program and to actively syndicate such programs in foreign markets; and (6) allowed limited network participation in first-run syndication. The Commission also adopted a new definition of "network" and imposed certain behavioral safeguards and reporting conditions.[5]

5. Court Review. On appeal, the Court vacated the 1991 R&O except insofar as that decision repealed the 1970 finsyn rules,[6] but stayed its judgment for 120 days to allow for further Commission action.[7] In the Court's view, the R&O failed to explain adequately how the 1991 rules satisfied the Commission's goals of program source and outlet diversity.[8]

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[4] See Network Television Broadcasting, 23 FCC 2d 382, 400 (1970) (1970 Order), aff'd sub nom. Mt. Mansfield Television v. FCC, 442 F.2d 470 (2d Cir. 1971).

[5] See 47 C.F.R. §§ 73.658(k), 73.659 - 73.662, 73.3526(a)(11) (1991).

[6] Schurz, 982 F.2d at 1057. In response to the Court's request, 982 F.2d at 1055, the Commission advised the Court that it had no independent intention to repeal the 1970 rules in its R&O. See Public Notice, FCC 92-520 (released Nov. 20, 1992) (Chairman Sikes and Commissioner Quello dissenting and issuing statements).

[7] Schurz, 982 F.2d at 1057. On April 5, 1993, the Court granted the Commission's request that the Court extend this stay for 60 days or until the new rules become effective, whichever date occurs sooner.

[8] See Schurz, 982 F.2d at 1049-55.

Moreover, while the Court did not rule out that the 1991 rules might be justified, the Court stated that the R&O did not adequately explain why we rejected certain network arguments raised during the course of the proceeding.[9]

6. The Court identified five issues for Commission resolution, most of which bear directly on the financial interest restrictions. First, the Court observed that by imposing the thirty-day two-step negotiations separation requirement on network acquisition of financial interests and syndication rights ("back-end rights"), the rules appeared to reduce the networks' ability to effectively bid for television programming from outside producers, thus diminishing the number of potential buyers available to producers, and impeding our goals with regard to program source diversity. See Schurz, 982 F.2d at 1051. The Court observed that the 1991 rules apparently reduced the effective ability of the networks to become another source of financing and limited the production financing options of outside producers, particularly for the small, new producer who is most in need of financing and risk sharing. Id. According to the Court, this dynamic appeared to encourage the concentration of program sources rather than to enhance program source diversity. Id. Moreover, the Court identified the 40 percent scheduling restriction on network in-house productions as a new limitation on one of the existing sources of programming (i.e., the networks), which, in the Court's view, appeared to be a further impediment to greater diversity of program sources. Id. at 1051.

7. Second, the Court stated that the rules, as formulated, did not appear likely to prevent the networks from using any market power they might possess to pay less for programming than they would in an optimally competitive market (e.g., by paying reduced prices for back-end rights). See Schurz, 982 F.2d at 1052. To the extent the 1991 rules attempted to ensure network payment of a competitive price for back-end rights, the Court indicated that the rules would nevertheless fail to prevent the networks from offsetting any such competitive payments by reducing the license fee they would agree to pay a producer. See id. Thus, the Court concluded that the rules would apparently not increase the prices that producers receive, and would only increase costs of production by limiting the producers' opportunities for financing. Id.

8. Third, the Court observed that the 1991 rules appeared to impede the emergence of new networks such as Fox. Such an effect would not only

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[9] Id. Notably, the Court supported two important aspects of the 1991 Order. First, the Court agreed with the Commission that the structure of the television industry has changed significantly since the financial interest and syndication rules were adopted in 1970. Second, the Court agreed that the Commission has the authority to regulate the networks in accordance with the public interest, convenience or necessity and, thus, has the authority to restrict network programming activities so as to foster diversity of programming sources and outlets that might result in a greater variety of programming than the free market would provide. Id. at 1046, 1048-49.

limit competition to the three established networks, but could also harm independent television stations whose access to new programming provided by an emerging network becomes limited by that network's disincentive to expand to capacity. Schurz, 982 F.2d at 1053.

9. Fourth, the Court said that the Commission had not adequately addressed the apparent contradiction between our 1991 analysis, findings and conclusions, and the tentative findings and conclusions set forth in the Commission's 1983 Tentative Decision and Request for Further Comments (Tentative Decision) in Docket 82-345, 94 FCC 2d 1019 (1983). The Tentative Decision proposed to repeal the financial interest restrictions and retain syndication restrictions, and to sunset any remaining constraints by 1990. The Court specifically noted that the Commission, in its 1983 Tentative Decision, rejected the proposition that the networks had significant market power, and had found that restrictions on financial interests under the finsyn rules prevented efficient risk-sharing and were unsound. Schurz, 982 F.2d at 1053-54.

10. Finally, the Court asked for a more precise discussion of the types of diversity that the Commission intended to foster with the 1991 rules, along with an explanation of how the 1991 rules would promote such goals. The Court stated its assumption that our ultimate goal is programming diversity, with source and outlet diversity as mere means of achieving that goal, and questioned whether increasing the numbers of producers or outlets as goals in and of themselves was a valid regulatory objective. Schurz, 982 F.2d at 1054-55.

11. The Second Further Notice. In response to the Court's remand, we adopted a Second Further Notice of Proposed Rulemaking, in which we sought comment on these issues.[10] In addition, we asked whether any marketplace or regulatory developments had occurred since the adoption of the 1991 rules that warranted additional consideration on remand. We also invited comment on whether we should modify our planned four-year review of the rules or, alternatively, designate a time by which the rules would sunset. Fourteen parties filed initial comments and twelve parties filed reply comments in response to our Second Further Notice.[11] This Second R&O resolves the

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[10] See Second Further Notice of Proposed Rulemaking in MM Docket No. 90-162, 8 FCC Rcd 223 (1992).

[11] A list of commenters is attached as Appendix A. We note that one party -- McKinnon Broadcasting Company (McKinnon) -- submitted reply comments urging the Commission to impose affiliation retrictions on the networks, so as to favor domestic stations over foreign stations serving the same market. These restrictions would apply to programming for which a network acquired financial interests or syndication rights under the new rules. We decline to adopt McKinnon's proposal because it exceeds the scope of the concerns that the Schurz Court instructed us to consider in reviewing the finsyn rules. Moreover, the Commission recently considered and rejected a very similar request submitted by McKinnon. See Memorandum Opinion and Order, 7 FCC Rcd 7554 (1992).

issues raised by the Court.

III. Discussion

A. Network Acquisition of Back-End Rights

12. In this Second R&O, we have decided to remove all restrictions on network acquisition of financial interests and syndication rights in network prime time entertainment programming, except for certain reporting requirements set forth below.[12] In addition, we have eliminated the 40 percent schedule cap on network in-house program productions, and have decided to prohibit networks from actively syndicating programming domestically. Accordingly, we will no longer impose any limit on the amount of entertainment programming a network can produce for broadcast during prime time. These actions are precipitated by the Schurz Court's objections to the 1991 rules, ongoing marketplace changes since the 1991 rules, and the record evidence in this proceeding. We believe that these changes eliminate unnecessary regulatory complexity. We are convinced that the less complicated finsyn framework regime we are adopting today will foster an increase in diverse programming without creating undue risks.

13. The 1991 Rules. In our 1991 R&O, we relaxed the constraints on network acquisition of back-end rights by retaining restrictions only in connection with prime time network entertainment programming and first-run syndicated programming.[13] Thus, we ruled that the finsyn rules would not be applied to non-entertainment programming in prime time, or to any network programming outside of prime time.[14] Moreover, we intended to grant the networks substantial new latitude in purchasing back-end rights in network prime time entertainment programming, by permitting network acquisition of financial interests and passive[15] domestic and foreign syndication rights in all such programs, subject to the following restrictions:

> (a) A network could only purchase such interests and rights in outside productions pursuant to negotiations separate from, and initiated no less than 30 days after, execution of the network license fee agreement (and, where applicable, a pilot production agreement).
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> (b) Co-production arrangements between a network and a domestic

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12 See infra Section E.

13 R&O, 6 FCC Rcd at 3100-01. We discuss first-run syndicated programming separately below. See infra Section C.

14 R&O, 6 FCC Rcd at 3100.

15 The 1991 R&O also granted networks more flexibility to actively syndicate network programming in both the domestic and foreign markets. See infra Section B.

producer could be initiated only by the outside producer, who would be provided a 30-day cooling-off period before the arrangement became binding.

(c) A network was required to certify that access to its schedule was not conditioned on the acquisition of such interests and rights.

(d) Cross-extraction was prohibited -- that is, a network could not condition access to its network on a producer granting interests and rights in other programs that would air elsewhere.

(e) Networks were required to maintain semi-annual reports in their owned and operated stations' public files. These reports were to include network certification of compliance with the finsyn rules and other specific information regarding prime time entertainment programs which it had produced or aired or in which it held financial interests or syndication rights.

14. As explained below in Section B, we also imposed restrictions on syndication practices to prevent network abuse of the programming distribution process, including prohibitions on active syndication. Because we decided to allow networks to actively syndicate "in-house productions"[16] scheduled and broadcast over their own network,[17] we determined that a cap should be imposed on network in-house prime time entertainment productions. Otherwise, networks would have an incentive to produce as much prime time entertainment programming in-house as possible, in order to take advantage of their new-found active syndication opportunities.[18] Accordingly, we prohibited a network from producing in excess of 40 percent of its prime time entertainment schedule in-house.

15. Our basis for allowing a greater network role in the acquisition of financial interests and passive syndication rights was to encourage diversity of programming and programming sources by opening up new avenues of financing for producers. See R&O, 6 FCC Rcd at 3107 and 3129. Under the 1970 rules, the networks would only pay a fee for the right to exhibit a program (the license fee), which was typically insufficient to cover production costs. The networks were precluded from providing additional

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16 "In-house productions" were defined as co-production arrangements between a network and an outside domestic or foreign producer, as well as prime time entertainment productions produced solely by a network.

17 For the domestic market, we continued to prohibit networks from actively syndicating any outside productions or in-house productions aired on another network. See R&O, 6 FCC Rcd at 3136-37.

18 We also based this restriction on the grounds that a cap would prevent networks from coercing outside producers to agree to in-house production arrangements, and would ensure a certain degree of diversity. See R&O, 6 FCC Rcd at 3121.

financing through the purchase of financial interests and syndication rights. In 1991, the Commission attempted to ameliorate this impediment, thereby providing additional possibilities of financing to producers. We also observed that allowing the purchase of both financial interests and passive syndication rights would help promote network program diversity by giving networks the opportunity to generate additional revenues in an increasingly competitive video marketplace. Id. at 3129.

16. Court of Appeals Decision. The foremost objection by the Schurz Court to the 1991 limits on network acquisition of back-end rights was that these limits perpetuated direct impediments to any goal of increasing program diversity or diversity of programming sources. According to the Court, the rules directly circumscribed the networks' ability to purchase back-end rights and thus limited[19] a major source of financing for outside producers as a whole. Because the back-end rights are the riskiest component of a producer's property right, these limits appeared to bear most heavily on the smallest and newest producers who are in most need of financing. In contrast, the rules were likely to protect larger producers against new competition both from the networks (because of the 40 percent scheduling cap) and from new producers who could compete more effectively if impediments on network financing were removed. The Court asserted that this analysis of risk and its bearing on competition in the program industry -- although speculative and theoretical -- is corroborated by the increasing concentration of the production industry since the Commission first banned network purchase of back-end rights in 1970. Schurz, 982 F.2d at 1051.

17. Despite its criticism, the Court acknowledged that "network distribution offers advertisers unique simultaneous access to a large fraction of American households and increases the prospects for successful syndication, which apparently is where the real money in the creation of television entertainment is to be made."[20] Thus, the Court stated that the Commission could find that a network uses the power derived from this market structure to drive a harder bargain with producers than it would otherwise be able to do.[21] According to the Court, however, our 1991 safeguards on network acquisition of back-end rights -- designed to prevent network exploitation of such power -- were ineffective. Under the Court's analysis, the 30-day freeze on back-end negotiations (our principal safeguard against network extraction of back-end rights), could not prevent a network from exercising this power because the network could extract the same value during negotiations over the network license fee. Thus, the Court concluded

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19 While the Court acknowledged that the 1991 rules would theoretically allow some increased degree of network participation in financing programming, the Court took the position that we did not adequately respond to the network argument that, in practice, the 30-day negotiations separation requirement effectively prevented the networks from ever buying back-end rights. Schurz, 982 F.2d at 1051.

20 Schurz, 982 F.2d at 1052.

21 See id.

that, based on the arguments presented to it, our 1991 rules ultimately appeared only to "increase the costs of production by denying producers the right to share risks with networks."[22]

18. The Court acknowledged that its analysis of our 1991 rules could be incorrect. In vacating our decision, however, the Court stressed that we failed to provide adequate explanation for rejecting the above objections. Similarly, the Court stated that we failed to distinguish the analysis and conclusions of our 1983 Tentative Decision, in which the Commission endorsed positions that were more deregulatory than our 1991 decision. The Court specifically cited our 1983 tentative conclusions that the networks lacked significant market power, that any constraints on acquisition of financial interests prevented efficient risk sharing and thus ran counter to diversity goals, and that the 1970 rules were unsound. See Schurz, 982 F.2d at 1053-54. Finally, the Court instructed us to explain explicitly (a) what type of diversity goals we are seeking to foster, (b) whether fostering each identified goal falls within our public interest mandate, and (c) how our rules foster these goals.

19. Remand Comments and Replies. On remand, the Coalition to Preserve the Financial Interest and Syndication Rule (Coalition), Media Access Project, et al. (MAP), the Association of Independent Television Stations, Inc. (INTV), Chris-Craft Television Inc., et al. (Independent Stations), and the Writers Guild of America, West, Inc. (Writers Guild), all continue to support the 1991 finsyn limits on network acquisition of financial interests and syndication rights.[23] Of these parties, the Coalition provides the most comprehensive response to the Court's objections to these limits.

20. The Coalition raises two fundamental arguments on remand. First, it continues to contend that the market in which producers sell their programs is not competitive -- i.e., that the networks have market power, which they will use to reduce the prices paid for back-end rights to prime time entertainment series to the lowest possible level a producer is willing to accept. The Coalition terms this dynamic "first degree price discrimination" and argues that it will result in programming prices and producer profit margins below those that would occur in a competitive market. Second, the Coalition relies upon its theory of first degree price descrimination to explain why the principal "extraction" safeguard of the 1991 rules (i.e., the 30-day negotiations separation requirement) is not, as sketched out by the Court, ineffective.

21. With respect to market power, the Coalition asserts that such power derives from the network structure, which offers simultaneous access to a large percentage of American households, access that is essential for

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22 Id.

23 Two commenting parties -- Program Producers and Distributors Committee (PPDC) and King World Productions, Inc. (King World) -- focus almost exclusively on the rules' approach toward first-run syndication.

producers of prime time entertainment series capable of successful syndication. According to the Coalition, the desirability of network access enables the networks to force producers to relinquish their back-end rights for the minimum the producer is willing to accept (i.e., the cost of production plus a "nominal" profit). The Coalition argues that this practice of first degree price discrimination is an effective strategy for driving down the producer profit margins below that which would occur in a truly competitive market.

22. Critical to the Coalition's argument is the proposition that the networks' power is not undercut by the availability to producers of alternative program buyers. The Coalition explains that a separate market exists for prime time entertainment series capable of successful syndication, and that the networks are the only significant buyers in this market. Thus, alternative, non-network methods of distribution (e.g., cable, first-run syndication, DBS, VCRs) are not reasonable substitutes for network distribution.[24] Moreover, the Coalition contends that the networks engage in interdependent, parallel behavior, which, while not expressly collusive, nevertheless eliminates the competition between networks for programming, and precludes a producer from seeking better offers from another network. The Coalition argues that the networks offer common license fees, option terms, option dates, rerun reimbursements, spin-off protections, exclusivity, post-term rights, and union escalators, and will not negotiate these terms; that license fees for programs have remained virtually flat since 1984 (shortly after the networks lost their effort to have the Commission repeal the finsyn rules); and that each network structures the program purchasing process in a way that locks a particular producer into a particular network at a very early stage in the bargaining process. See Coalition Comments at 11-14.

23. The Coalition's second fundamental argument on remand -- that the 30-day negotiations separation requirement ensures, to some extent,

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[24] Put another way, the Coalition argues that alternative program buyers are not reasonable substitutes for the networks because suppliers of network prime time entertainment programming would not turn to these alternatives in sufficient numbers to render any decrease in the prices offered by the networks unprofitable. Coalition Reply Comments at 13. The Coalition also relies on the Declaration of Dr. Frederick R. Warren-Boulton (Warren-Boulton Declaration), submitted as Attachment 5 to its Reply Comments, to argue that the networks' monopsony power in the market for syndicatable programs (i.e., economic power in the purchase of such programs) cannot be constrained by alternative markets for producers, because the expected values of back-end rights to non-network programs are systematically and significantly less than the expected values of the back-end rights to network programming. See Warren-Boulton Declaration at 20. According to this Declaration, the U.S. Department of Justice's Merger Guidelines would term a difference in value of five percent or more "significantly less" when comparing alternative price offers, and the difference in syndication value between a network and a cable program is much higher than that. Id.

the efficacy of the rules' restraints on network abuse in the acquisition of back-end rights -- begins with the acknowledgement that a network cannot extract greater than fair market value for back-end rights unless it can negotiate for the back-end rights before committing to exhibit the programming; otherwise, the network will be unable to tie the grant of the back-end rights to network access. According to the Coalition, the 1991 30-day negotiations separation requirement goes a long way to break this link because it prevents the network from initiating any negotiations over the back-end rights until after the network has given some degree of commitment to the producer on the program (in the form of an exhibition license fee). Thus, the producer has an opportunity to sell the back-end rights to a non-network backer without the certitude that such a sale will preclude network exhibition.

24. The Coalition responds to the Court's counterargument -- that a network could simply lower the amount offered for the exhibition license to capture lost extraction on the back-end rights -- by contending that the 30-day negotiations separation requirement makes it much more difficult for a network to calculate the minimum overall price the producer would be willing to accept. Thus, the network will be unable to extract as much through the purchase of the exhibition license as it would if the negotiations over the license and back-end rights were done at the same time.[25]

25. Related to the above arguments are five points raised by the Coalition to refute the Court's complaint that the rules ostensibly limit diversity of programming sources. First, the Coalition disputes the assertion that the practical effect of the 30-day separation requirement is to preclude any opportunity for the networks to finance programming through the purchase of back-end rights. The Coalition states that the requirement only eliminates this opportunity if the networks are unwilling to agree to the exhibition license absent firm financing in hand. If a network wants to finance a program, it can purchase the license and then wait 30 days before negotiating for financing. Refusals to purchase the license without adequate financing in place is a creation of the networks themselves. See Coalition Comments at 20-21.

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[25] The Coalition explains that when negotiations occur at the same time, a network will simply offer the producer his or her cost of production (defined to include a nominal profit) for all rights to the program, a cost that is easily ascertainable. The producer will effectively be forced to accept this offer because otherwise the network will deny access to its network. In contrast, if the network is prevented from negotiating for the back-end rights at the time of negotiations for the license, the network would offer less than the cost of production for the license (because the network is not getting the back-end rights), but the amount less is very hard to calculate because it would reflect the value of the back-end rights, which is a quite uncertain figure. Thus, the network will either offer below the minimum the producer will be willing to accept -- in which case the producer will reject the offer -- or more. Accordingly, all consummated deals will be above the minimum price.

26. Second, the Coalition argues that allowing networks to offer financing without restraint will not, in practice, increase opportunities for the small, unproven producer. The Coalition explains that independent studios will have little incentive to finance the smallest and newest producers because of the likelihood that those producers will leave the studio for a network as soon as they become successful. According to the Coalition, this is likely because the networks have the ability to entice newly successful producers with the promise of putting them on the air -- a promise that cannot be matched by the studios. In tandem with this dynamic is the probability that the networks will refuse to deal with such producers before they become successful. Thus, the result is that the small, unproven producers will have tremendous difficulty obtaining financial backing from anyone. See Coalition Comments at 8-9.

27. Third, and more generally, the Coalition believes that the networks are not uniquely efficient risk-bearers and will therefore add little to the financing opportunities now provided to producers by the studios. Coalition Comments at 25. Implicit in this argument is the idea that letting the networks acquire back-end rights will simply result in the substitution of the networks for the independent studios as the primary financiers of the prime time entertainment programming industry. If the networks do not offer any particular advantage as risk-bearers, limiting their ability to finance productions will not lessen diversity.[26] In addition, the Coalition contends that the program production industry is neither concentrated nor characterized by high barriers to entry, and that several hundred new producers, the vast majority of which are small and independent, have entered the marketplace since the inception of the finsyn rules. These facts, according to the Coalition, belie the network and Court prediction that the 1991 safeguards will impede the newest and smallest producers from entering the marketplace. See id. at 25-26.

28. Fourth, the Coalition defends the 40 percent cap on network in-house programming as a necessary element of the overall framework of the 1991 rules.[27] Specifically, the Coalition argues that because the 30-day negotiations separation requirement impedes the networks from effectively extracting profits from an outside producer, they have an incentive to bring productions in-house, which is not subject to the 30-day safeguard. Without

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[26] Moreover, as discussed above, the Coalition believes that allowing the networks to supplant the studios in this way will undermine diversity; producers will be forced to sell their back-end rights to the networks at less than competitive prices -- thus reducing the incentives that encourage growth in the production industry -- because the networks operate a gateway that they can exploit to force such sales.

[27] In addition, the Coalition urges adoption of a 25 percent subcap on in-house TV movies, miniseries, and other non-episodic programs a network may air during prime time. The Coalition argues that without such a subcap, the networks could threaten to produce all such programs in-house. Coalition Comments at 23-24.

the 40 percent cap, the networks could simply use their market power to require that all shows be produced in-house (by refusing to carry any outside produced programs). Coalition Comments at 22-23. Moreover, the Coalition believes that the 40 percent cap will not limit overall program production since there is no indication that existing network production entities are more cost efficient producers of programs. Id. at 23 n.43.

29. Finally, the Coalition disputes the claim that under the finsyn rules the production community has become increasingly concentrated. According to the Coalition, the number of new program ideas proposed to the networks is greater than ever, with approximately 1,000 program proposals pitched annually by at least 300 to 400 individuals and firms. Coalition Comments at 6. The Coalition believes that reliance on the Court's concentration statistics[28] is misleading, because those figures are based on copyright ownership, which significantly understates the true level of diversity in the program production marketplace. The Coalition argues that the "relevant measure for . . . [assessing the number and diversity of producers in this market] is the number of individuals who are presenting program ideas to the networks each year and creating the programs." Id. at 7. The Coalition therefore believes that a more accurate measure is to count the number of "executive producers" of network programs, which has risen from approximately 70 in the late 1960s and early 1970s to 125 in recent years. Id. In the Coalition's view, the fact that emerging producers may affiliate with a larger entity for financing purposes in no way lessens the number and diversity of program ideas and competing producers. Id. at 7-8.

30. The major networks -- Capital Cities/ABC, Inc. (ABC), CBS Inc. (CBS), and National Broadcasting Company, Inc. (NBC) -- along with Fox Broadcasting Company (Fox), FBC Television Affiliates Association (Fox Affiliates), CBS Television Network Affiliates Association/Schurz Communications, Inc. (CBS Affiliates/Schurz), Action for Children's Telvision/Henry Geller (ACT/Geller), Quincy Broadcasting Company (Quincy), and the American Federation of Television and Radio Artists (AFTRA), urge the Commission to repeal all restraints on network acquisition of financial interests and syndication rights. The major networks provide the most extensive discussion in this regard, with the other parties voicing generalized support for repeal of all the 1991 finsyn rules. In general, the networks' objections to the constraints on acquisition of back-end rights are consistent with the Court's objections. The networks argue that they do not have sufficient market power to cause the harm with which they are charged, that in any event the rules could not prevent the exercise of such power even if it did exist, and that, in practice, the rules do not further any legitimate diversity goals and in fact appear to harm them.

31. On market power, CBS and NBC contend that the networks lack the

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[28] According to the statistics cited by the Court, the share of prime time programming accounted for directly or indirectly by the eight largest producers has risen from 50 percent to 70 percent since the finsyn rules were originally adopted. Schurz, 982 F.2d at 1046-47.

power to obtain back-end rights at below competitive market rates, and that such an absence of power eliminates any justification for constraints on a network's ability to purchase these rights. While ABC agrees with the thrust of the other two network's discussion, ABC frames the market power issue slightly differently. ABC contends that constraints on network acquisition of back-end rights are improper if the networks lack power to threaten the viability of the production community. Thus, the crucial question for ABC is whether a network's putative economic power is sufficient "to threaten the ability -- or the incentive -- of an independent producer to remain in business." ABC Comments at 7. ABC argues that any firm that can, to some degree, differentiate its product or service from those of its rivals has "market power" and can drive a harder bargain than it otherwise could. To this extent, the question of whether a firm has any "market power" is essentially meaningless. A network, of course, has some power to make itself attractive to program sellers -- through the network's nationwide reach and sizeable audience. Other competing buyers, however, have alternative features that are similarly attractive -- cable can tap its dual revenue stream for payment, and movie studios can offer nationwide theatrical and videocassette promotion and distribution (followed by cable and broadcast exploitation, including syndication). Thus, the question, for ABC, is not whether the networks have any market power, but whether they have sufficient economic power to threaten the viability of independent producers or their incentive to remain in business. See ABC Comments at 11-12.

32. The three networks provide a number of reasons for disclaiming any economic power in the purchase of programming, including the following: (a) each network's share of the market is too small to constitute economic power warranting regulation; (b) producers have ample opportunity to offer programs to buyers other than a given network, such as the other two networks, purchasers of first-run syndicated product, Fox, cable and the theatrical film industry[29]; (c) the networks do not behave collusively,[30] accrue no power from such behavior, and, in fact, each network competes vigorously for programming and provides a separate opportunity for

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[29] The networks offer various reasons for concluding that these various avenues for distribution are, in fact, reasonable substitutes for an individual network buyer. For example, ABC argues that theatrical films, made-for-cable movies, and first-run syndication all fall within the limited market that proponents of the finsyn rules feel is the proper focus of inquiry (i.e., high quality programs that have the potential for extended exploitation via syndication). See ABC Comments at 8-9; see also NBC Comments at 9-15.

[30] In addition, ABC argues that there is substantial reason to believe that the unstructured, idiosyncratic nature of the program development process makes such collusion highly unlikely. ABC Comments at 8. Moreover, the networks contend that they do not impose largely uniform contract terms on their suppliers; to the extent that some terms are similar, this does not enable a network to demand concessions without losing producers to the competition. See ABC Comments at 8 n.20.

producers; and (d) certain other practices -- like negotiating for a script freeze -- do not give the networks any particular power to extract below market prices from the production industry or otherwise threaten the viability of the programming community.[31]

33. The networks contend that even if they have some degree of economic power, the rules would both be unnecessary and ineffective to prevent abuses. ABC, for example, observes that the rules are unnecessary because the networks have no incentive to encourage or precipitate concentration in the production commununity; a large array of producers provides the networks with a diverse range of programming choices and reduces both producer clout and the danger of overdependence on any single source or group of sources. ABC Comments at 13 and 5 n.13. The networks also endorse the Schurz Court's analysis indicating that the rules are an ineffective means of preventing the exercise of economic power. Thus, the networks argue that rules do not prevent them from shifting to another point in the program development process any abuses of market power that might otherwise occur during negotiations over back-end rights, and that any potential for abusing economic power is therefore not eliminated by

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[31] ABC argues that "customizing" programs for a network does not reflect network market power because (1) the competitive opportunities are full blown at the early stages, when a producer is offering a program idea -- at this stage, there are no significant outlays and no obligation to any network; (2) networks are constrained from exploiting their bargaining leverage even after negotiating for restraints on the producer's ability to offer a project to others, because of the fluid nature of the process, the alternatives available to desired talent inputs, and the imperative to attract good new programs; and (3) the network is constrained by the money it has invested in the project and by the pressure created by the impending Fall schedule. See ABC Comments at 9-11. In response, the Coalition argues that producers become "locked-in" to a network for a particular program well before the negotiations for the program rights take place. Specifically, the Coalition contends that networks do not negotiate license terms at the pitch stage, so there is no real opportunity for a producer to exploit any competition that might otherwise occur between networks. The Coalition also contends that the networks do not offer more favorable license terms in order to attract producers. See Coalition Reply Comments at 15. In addition, the Coalition disputes ABC's claim that the networks cannot use access to the network to force a producer to surrender back-end rights because of the possibility of production difficulties in the Fall and the "sunk cost" of the script. The Coalition points out, first, that the network negotiates license fees when it orders pilots for Fall series in late January to March; production does not begin until August. Second, the Coalition argues that the number of scripts ordered are so high, and the prices paid for them so low in comparison to the license fees it pays for pilots and series, that a network would not agree to allow a producer to keep back-end rights simply because the network paid for a script and might lose this investment if the producer walked away. See Coalition Reply Comments at 15 n.21.

forbidding or limiting networks from purchasing back-end rights.[32] See, e.g., CBS Comments at 9; ABC Comments at 14.

34. The networks also argue that in addition to being ineffective as a means for encouraging diversity or preventing alleged network abuse of economic power, the rules' constraints on network acquisition of financial interests and syndication rights also affirmatively prevent diversity, both in theory and in practice. Most fundamentally, the networks endorse the Court's argument that the rules appear to directly inhibit financing of programming -- and thus the incentives that increase diversity of programming sources -- by removing three major sources of financing (i.e., the networks) from the array of backers that a producer may seek. See CBS Comments at 12-13. In addition, the networks cite several other related arguments.

35. First, the networks argue that rather than lifting profit levels above a competitive rate for producers as a whole -- which the 1983 Tentative Decision concluded was only a remote possibility -- the finsyn rules tend to increase the profits of the most successful program suppliers (whose success gives them leverage), at the expense of the smaller and less successful producers. See ABC Comments at 14-16; CBS Comments at 11-13; NBC Comments at 21.

36. Second, in contrast to the Coalition's assertions, the networks stress that the 30-day negotiations separation requirement effectively precludes all opportunities for network financing. As ABC points out, producers "must explore 'deficit' financing options" long before a network license fee agreement is signed, because the availability, size and terms of that financing will determine the program budget the producer can afford and the deficit he or she can realistically accept. ABC Comments at 17-18.

37. Third, the networks assert that the real life effect of the finsyn constraints on network acquisition of back-end rights has been an increased concentration of the production industry. Both NBC and CBS offer examples in the recent past of small producers either being driven out of business or into the arms of the large studios. See NBC Comments at 21-22; CBS Comments at 10 n.26. In addition, ABC cites a previously submitted showing in this

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[32] Citing the 1980 study by the FCC's Network Inquiry Special Staff, the networks also contend that no matter how much power each one possesses, none of them can force a producer to sell programs at rates that are unprofitable. See Network Inquiry Special Staff, New Television Networks: Entry, Jurisdiction, Ownership and Regulation, V. II at 793 (1980) (NISS Study). Before this would occur, producers would refuse to supply programs. Therefore, unfettered network participation in the program acquisition market will not adversely affect diversity; at most, constraining such participation would merely redistribute rents among the industries and players, with no net gain by the public. See CBS Comments at 10-11; ABC Comments at 13; NBC Comments at 7 n.9.

Docket[33] of increased producer concentration due to the finsyn rules, submits an affidavit by economist Bruce M. Owen to show that concentration in the prime-time network program supply has continued to increase since the 1988-89 season, and stresses that in the 1991-92 season, the total number of suppliers (26) matched the 1985-86 season's all-time low, and that the four-firm, eight-firm and twenty-firm shares were at an all-time high. See ABC Comments at 20 and Exhibit A thereto. In addition, ABC disputes the assertions of the 1991 finsyn rule proponents that producer diversity has increased, pointing out that these proponents do not look at the number of copyright holders, but rather the number of individuals who happen to be listed as a "producer" of a project. ABC stresses that the critical issue is who has power over a project, not who has received an essentially arbitrary title. The copyright holder is, in fact, the person who has the ultimate control over the programming project and the contractual responsibility for delivering an acceptable program to the network.[34] See ABC Comments at 20-21.

38. Fourth, the networks cite the 40 percent cap on network in-house prime time productions as a direct limitation on diversity. Moreover, ABC points out that the cap does not prevent a network from obtaining its programming from limited sources, even a single supplier; accordingly, the cap provides no assurance of diversity. See ABC Comments at 28. In fact, ABC asserts that a network is more likely to take more than half of its prime time entertainment programs from a single outside supplier than to produce such percentages of programming itself.[35] ABC also argues that since networks have a right and, indeed, an obligation to exercise creative

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[33] Crandall, "The Economic Case Against the FCC's Television Network Financial Interest and Syndication Rules" (filed June 13, 1990).

[34] In its reply comments, the Coalition disputes the networks' estimates -- using the networks' own standard -- arguing that they omitted a number of production entities and counted certain producers as independent before the rule took effect, but listed them as studio producers after the rule took effect. See Coalition Reply Comments at 7. The Coalition also responds to network assertions that the number of producers of prime time network programming dropped significantly right after the finsyn rules were adopted. According to the Coalition, this number dropped because the Commission had just adopted the Prime Time Access Rule (PTAR), which reduced by one fourth the number of prime time hours available for network programming. Id. ABC and NBC, in turn, rely on a second affidavit by Bruce M. Owen, submitted as Attachment A to ABC's Reply Comments ("Owen Reply Affidavit"), to assert that the adoption of PTAR cannot account for the decline in the number of producers that occured after the finsyn rules were first imposed.

[35] ABC Comments at 28. The Coalition terms such a result implausible and contradicted by the networks' assertions that such a practice would be contrary to their interests. Coalition Reply Comments at 19. Moreover, the Coalition observes that network in-house productions have steadily increased in recent years. Id. at 19 n.27.

control over their schedules, allowing full in-house program ownership of all prime time shows would not affect the status quo. Whether the network or an outside party produces a program, the network will retain final say in the choice of producer and the end product. Since the 40 percent cap does not alter this basic network role, ABC argues that the cap fails to further any legitimate diversity goal. See ABC Comments at 28.

39. Finally, the networks question a fundamental premise of the rules restricting their acquisition of financial interest and syndication rights -- the premise that an increase in programming sources serves a legitimate diversity goal. CBS argues that the sheer number of producers of prime time network entertainment programming cannot assure or even advance the aim of enhanced diversity in the content of programming available to viewers, because the diversity of programming is far more likely a function of available outlets. CBS Comments at 16-17. CBS then points out that the finsyn rules have not triggered the expansion of outlets accessible to suppliers of programming; rather, this expansion is attributable to technological changes and perhaps the Commission's ownership restrictions. Id. at 17. Moreover, expanding upon ABC's objections to the 40 percent cap, CBS contends that the finsyn rules do not and cannot affect the control exercised by each outlet over the content of the programming it airs, or its incentives to offer to viewers material obtained from diverse sources; under the Communications Act, programming choice is left to the broadcast stations, and regardless of the numbers of competing producers in the marketplace, stations (and networks) will seek from their suppliers the range and types of programs that they believe will best attract and retain audiences.[36] Thus, CBS concludes that "[r]egulation seeking to expand the number of suppliers is . . . inherently incapable of influencing the variety of programming available from any one outlet, or from video outlets as a whole." CBS Comments at 17-18. See also NBC Comments at 25 (arguing that finsyn "rules do not increase the number of video outlets, and as each outlet continues its same approach to the content it offers viewers, the notion that producer numerosity will give viewers more diverse programming simply doesn't make sense"); ABC Comments at 5 (stating that Commission "must explain why sheer producer numerosity affects the public interest in program diversity").

40. Decision. The 1991 rules were intended to permit network purchase of back-end rights so as to provide new sources of financing available to producers. The Commission recognized the need to permit network participation in funding new programming, and we anticipated that relaxation of the financial interest restrictions would lead to significant advances in

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[36] CBS Comments at 17. ABC raises a similar point, stating that networks have both the right and the responsibility -- as program purchasers, owners of broadcast stations and agents for their affiliates -- to exercise broad creative control over all of the programs in their schedules, whoever the provider may be. ABC Comments at 5 n.13. ABC notes that the Commission's 1983 Tentative Decision recognized that the networks had this "right and responsibility" to exercise such control, and that the finsyn restraints were not intended to affect that control. Id.

the growth of the production industry. We stated that the absolute prohibition on network acquisition of financial interests

> disserves the public interest in diversity by limiting the funding of new, outside programming. Lifting the restriction will allow program producers to seek financing of their production "deficits" from the network carrying their programs -- and should thereby introduce new competition into the bidding for financial interests among the production studios, independent syndicators and other financiers of program production. Lifting the restriction could also increase overall investment in prime time entertainment programs, or at least increase a network's willingness to invest in particularly risky programming.

R&O, 6 FCC Rcd at 3107 (footnotes omitted).

41. As the Court indicated in Schurz, any constraint on network participation in the programming acquisition process places an ostensible limit on the development of the production community, by removing a group of major financiers from the array of sources that a producer could tap. The networks have asserted that the two-step, 30-day negotiations separation requirement effectively precludes them from bidding for back-end rights, particularly with respect to projects headed by small producers. According to the networks, producers will need to have a concrete financing plan in hand when negotiating with a network over the license agreement, yet the 1991 rules prohibit networks from offering such financing (through purchase of back-end rights) until 30 days after agreeing on the license. Thus, producers will invariably locate financing from sources other than the networks. See ABC Comments at 18. On further consideration of this matter, we agree that the 1991 rules favor this outcome and therefore discourage network investment in programming. While it is true, as the Coalition argues, that a network could try to alter its way of doing business to accommodate the 30-day requirement, the practical result will be either: (a) the producer procures financing before negotiating with the network over the license, or (b) the producer negotiates over the license without having any assurances of adequate financing to give the network, and without the option of discussing network financing (until 30 days after license negotiations are concluded). The former contingency shuts out the network completely, and the latter contingency presents a network with a disincentive for licensing the program. Accordingly, a producer will likely try to secure financing from non-network sources before negotiating with the network over the license (because of the 30-day requirement). In attempting to relax the financial interest restrictions in 1991, however, we did not intend to create an artificial disincentive, which works at cross-purposes with our goal of removing limits on the funding of new, outside programming.[37]

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[37] The Coalition's basic position, however, is that any increased availability of financing would be outweighed by the negative effects of network exercise of market power, which will lower the overall profit margin the producers can garner for their products, and thus reduce the incentives

42. To begin with, it is important to emphasize that the Commission's regulatory concern here with the program production market derives primarily from considerations of marketplace diversity. As requested by the Court, our approach toward diversity warrants some explanation. We have defined diversity in three basic ways: source diversity, outlet diversity and program diversity. As we stated in the Tentative Decision, source diversity "is a measure of the number of program originators," outlet diversity "is a measure of the number of independent transmission systems delivering programming to the public," and program diversity is "measured by the number of actual program categories or types offered." Tentative Decision. 94 FCC 2d at 1054.[38] These three ways of discussing diversity are interrelated. However, the regulatory purpose underlying the financial interest retrictions has been primarily to foster source diversity. This purpose is served only if the rules can reasonably be found to increase opportunities for producers and thereby expand the available sources of programming. Thus, we are not concerned with producer profit margins per se. As we stated in the Tentative Decision:

> Altering the distribution of profits among private parties is not, and never has been, a proper or desirable function of the Commission. Thus, to characterize increased profitability of producers as a goal of the rule is to misconstrue our true objective. We agree with the Network Inquiry Special Staff when it stated: "Indeed, neither the statutory nor the constitutional mandates under which the Commission operates can fairly be construed to authorize intrusion into the program supply business solely for the purpose of enhancing the profits of suppliers."[39]

If profits are competitive, then the only reason to employ regulatory devices to protect producer profits is if we determined that, for some reason, the public required a greater array of producers than the market

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for others to enter the market. On remand, the Commission is tasked with reassessing its 1991 finsyn rules to determine whether these rules have imposed unnecessary restrictions on network participation in the programming market.

38 We stress that the Tentative Decision did not impose any rule changes or set forth binding conclusions. Rather it proposed changes in the finsyn rules, sought comment on these changes, and presented factual findings that appeared to support the proposed rule changes. As pointed out by the Schurz Court, however, the Commission must explain any changes in the fundamental rationales or factual findings of the Tentative Decision. We do so in this Second Report and Order.

39 Tentative Decision, 94 FCC 2d at 1100, quoting NISS Study, Vol. II at 726.

would normally bear.[40] No party, however, has provided any reasoned justification for such a result here. In fact, market statistics show that there are an increasing number of alternative outlets for program production and syndicated program acquisitions. Moreover, as explained below, we have reassessed the conclusions in our 1991 decision and have now determined that our market analysis was too narrow and that program producers are not so limited in finding buyers for their products to justify continued restraints on network participation in the purchase of back-end rights.

43. In our Tentative Decision, we concluded that the networks lacked market power in the program acquisition marketplace. See Tentative Decision, 94 FCC 2d at 1094. In 1991, we approached the analysis somewhat differently, by defining the market in an exceedingly narrow fashion to include only prime time entertainment series capable of successful syndication, and citing the difficulty producers would have selling those types of programs to non-network outlets. However, we did not explain how this rationale comported with our findings in the 1983 Tentative Decision. We also did not explain sufficiently how changing market conditions for program acquisition and distribution could alter our definition of the relevant market. Based on the record now before us, we conclude that our market definition in 1991 was excessively narrow and, in any event, whatever market advantage the networks once enjoyed has further diminished.[41]

44. Initially, we note that the decline in network audience share, which largely explained the rule's relaxation in 1991,[42] has continued unabated. An FCC staff analysis indicated that the three networks' prime time shares dropped from 93 percent in 1975 to 61 percent during the 1990-91 television season.[43] By 1992, however, the networks' aggregate share of

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[40] Moreover, such regulatory devices would also have to result in a greater number of producers. As discussed below, however, the finsyn rules from their inception appear to have had the opposite result -- an increase in producer concentration, as measured by the number of copyright holders owning the programs.

[41] We also note that the expert agencies on competition, the Department of Justice and the Federal Trade Commission, have argued in this proceeding that the program acquisition market is competitive, and that the networks do not have the power, despite the advantages of being able to offer network distribution of programming, to drive prices below a competitive level. Comments of the United States Department of Justice in MM Docket No. 90-162, at 15-34 (filed June 14, 1990); Comments of Federal Trade Commission in MM Docket No. 90-162, at 23-37 (filed Sept. 4, 1990).

[42] R&O, 6 FCC Rcd at 3108.

[43] FCC Policy and Rules Division, Mass Media Bureau, "Overview of the Television Industry," filed in MM Docket No. 91-221, at 3 (March 1992). These figures are for a 52-week television season. For the shorter 1992-93 prime time audience season (September 21, 1992 to April 18, 1992) -- which

the prime time audience declined to 59 percent; the three networks' combined share of total day viewers dropped to 53 percent, down 1 percent from 1991 and 17 percent from 1982. Not surprisingly, between 1989 and 1992, network share of TV advertising revenues declined from 35 percent to an estimated 32.5 percent.[44] At the same time, the network share of entertainment programming expenditures continued to decline.[45] In short, the networks' position in the programming acquisition market is no longer as dominant and continues to erode.[46]

45. The decline in network share is attributable, in large part, to the emergence of other viewing options, including a new network, independent television stations, and cable television networks. Each of these alternatives represents not only a source of diversity for viewers, but an additional market opportunity for program producers. In particular, we now agree that the overall demand for programming in the broadcast and cable marketplace limits a network's ability to control the market or dictate prices for prime time entertainment programs. Moreover, the demand by non-network outlets for programming comparable to that licensed by the networks for prime time exhibition is continuing to expand. This is the result of a number of factors. While the number of network affiliates has remained fairly constant, Fox has emerged as a fourth network. It broadcasts prime time programming, including series and movies, similar to that of the other national networks.[47] Further, the number of independent stations has grown

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typically attracts greater network audience shares -- the three major networks had a combined 60 share, down from the 1991-92 prime time audience season combined network share of 63. See Washington Post, April 22, 1993, at D8.

44 NBC Comments at 12-13; CBS Reply Comments at 9.

45 NBC Comments at 13-14.

46 The networks also point out that it is deceptive to discuss their "aggregate" market shares, since they compete aggressively against one another. NBC Comments at 12, n.21. See also id. at 8 (arguing that the Tentative Decision found that the networks compete intensely). More recent figures show even further declines. See Communications Daily, April 21, 1993, at 9 (reporting that network viewing continues to decline, with NBC showing the largest drop for the 1992-93 season, down 10 percent to 18 percent of total viewing).

47 Since it was launched in 1986, Fox has increased expenditures for prime time programming by 800 percent. Fox Comments at 5. The number of different entities producing programs for Fox has grown from 6 annually to 30. Fox has aired 61 different series, 22 made-for-TV movies and 56 specials. Fox states it has spurred the creation of more than 8,300 jobs in the production industry. Id. at 6; FBC Affiliates Comments at 5. In addition, Fox has created a network news service. In the past 2 years, it has assisted 19 affiliates in creating their first local newscasts, and 17 more have requested assistance. Fox Comments at 7. The growth of Fox has

from 129 in 1980 to 380 in 1992.[48] The number of cable networks went from 34 in 1982 to 80 in 1992, and 100 in 1993.[49] As a result, more than half of all households now receive 10 over-the-air stations and, when cable services are included, a total of 30 channels of television programming.[50]

46. We also note that an increasing amount of entertainment series programming is being sold directly to local stations in the first-run market. Contrary to the Coalition's claim that network distribution is necessary to create quality programming capable of successful syndication, studios are producing an increasing number of "network quality" programs for the first-run prime time market. For example, Paramount's "Deep Space Nine" and "The Untouchables" have budgets of $2 million per episode (almost double the network average) and have clearances in 190 markets. "Deep Space Nine" is on 227 stations and has received record ratings. Time Warner launched the Prime Time Entertainment Network with "Time Trax" and "Kung Fu: The Legend Continues." Other studios, such as All American Television, Network Ventures and Cannell Distribution are also entering this market. NBC Comments at 11-12; Fox Reply Comments at 14-15. All American's "Baywatch" is cleared in 93 percent of the U.S. and there is talk of a spinoff.[51]

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assisted other non-Fox independents by allowing more programming to be available to the other stations (including sports) and by freeing up local advertising markets. Fox Comments at 7-8.

[48] Television & Cable Factbook, Warren Publishing, Inc., Stations Volume No. 60, 1992 ed. at A-17 - A-1282. The total number of independent stations includes Fox affiliates since they broadcast traditional independent station programming fare during a significant portion of the broadcast day.

[49] See "Cable Television Developments," National Cable Television Association, October 1992, at i-C; NBC Comments at 10. By 1992, basic and pay cable networks attracted a 24 share in prime time. NBC Comments at 10. Basic cable viewing continues to expand as network viewing decreases. See Communications Daily, April 21, 1993, at 9.

[50] Between 1985 and 1991, 58 percent of the producers that supplied one or more prime time entertainment series programs to the networks also supplied programs to Fox, cable and/or first-run syndication. NBC Comments at 14.

[51] CBS Reply at 11. The Coalition's argument that first-run programs are primarily "game shows" and "low budget remakes" (Coalition Comments at 16-17) rests uneasily next to the Independent Stations' claim that such programs contribute significantly to diversity. See, e.g., Independent Stations Comments at 8. See also PPDC Comments at 3-4. Moreover, the Coalition's suggestion that the new prime time first-run programs are merely remakes of popular films or "spinoffs" does nothing to distinguish them from network series (e.g., "M*A*S*H," "A League of Their Own," "Alice," "The Jeffersons"). See also J. Mandese, "Power Surge," Advertising Age, March 8, 1993, at S-6 (quoting Warner Bros. syndication executive, who

Several leading independent station groups have formed a consortium to develop and program prime time original series. CBS Reply Comments at 12.

47. The record does not support the Coalition's assertion that network distribution is necessary for the successful distribution of such programs. Recent launches of first-run dramas in prime time have not depended on clearance of network owned and operated stations or affiliates. ABC Reply Comments at 17. Time Warner, with no affiliates or owned stations, successfully launched its Prime Time Entertainment Network, gaining network-equivalent penetration and audience share. Fox Reply Comments at 14-15. Paramount has claimed that, in one key demographic group, its three prime time hours have outperformed the best shows on CBS, NBC or Fox. Id. at 15. And syndicators such as Viacom note that the odds of launching a show in first-run are better than succeeding by selling a show to a network. See NBC Comments at 12. Indeed, when given the choice of network or first-run distribution, studios increasingly are choosing the latter. Paramount turned down network offers for both "Star Trek: The Next Generation" and "The Untouchables" in prime time. "Deep Space Nine" was not even offered to the networks.[52] The shows have gotten strong ratings and Paramount has been selling 30-second spots for $200,000, a cost higher than 85-90 percent of network shows. CBS Reply Comments at 11. Accordingly, network affiliates are in many cases preempting network programs in order to obtain new first-run product.[53] The record supports the conclusion that first-run increasingly is a fully comparable alternative to network distribution.

48. Cable television networks represent another burgeoning market for programming.[54] In 1993, cable networks will spend $3 billion on programming -- $1.8 billion for original production. NBC Comments at 10. Cable networks are now purchasing a growing number of original series programs,

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stated "[w]e're producing our shows with the same production values, the same types of casts and the same budgets as we would for network TV").

[52] CBS Reply Comments at 3. Fox tried to license "Deep Space Nine," but Paramount would not sell. Fox Reply Comments at 11.

[53] Ten times as many network affiliates preempted network shows to clear "Deep Space Nine" and "The Untouchables" than did so when Paramount launched "Star Trek: The Next Generation" in 1987. Fox Reply Comments at 16. Sixty network affiliates have purchased Buena Vista's "The Crusaders" for next Fall, eleven of which will preempt network programming to run it. Another eighteen affiliates are considering the show for either the access period or prime time. Id.

[54] In 1983, basic cable networks spent $255 million on programming. In 1992, that figure approached $2 billion. This increased expenditure on programming reflects a growth in cable revenues from basic and expanded basic services from approximately $3 billion in 1983 to over $13 billion in 1992. See Cable TV Programming, Paul Kagan Associates, Inc., August 14, 1992, at 2.

rather than buying off-network syndicated programming.[55] For example, we note that five basic cable networks -- Nickelodeon, Family Channel Lifetime, MTV and USA Network -- tripled their programming budgets between 1988 and 1992 and together now purchase approximately 60 original series productions for their networks.[56] In many cases, the number of episodes of these programs produced and purchased is equivalent to the number of episodes of a successful network series.[57] We foresee that these market developments will be magnified as DBS enters the market and 500-channel cable systems are created.[58]

49. To complete the picture of the scope of the producers' market for selling their product, we observe that competition among the three original broadcast networks for programming acts as an additional constraint on the networks' ability to dictate terms of purchase. Thus, we now modify our assessment in 1991, which indicated that this competition did not constrain network power in program negotiations. In 1991, we noted three factors that appeared to support producers' concerns that there was little inter-network competition: (1) common terms in network/producer contracts, (2) creation of a customized product for a network, and (3) leverage by the networks over producers, particularly over new, untried producers. R&O, 6 FCC Rcd at 3111-12. We declined to find lack of inter-network competition, however, and we specifically avoided determining that these factors were the result of "collusion or conscious parallelism." Id. On further consideration, we find that none of these factors, either singly or together, overcomes our conclusion in 1983 that inter-network competition for programming is "intense."[59] It appears that the common contract terms are in large part due to the finsyn rules and consent decrees, which have limited "the array of possible terms of negotiation." See Comments of the Department of Justice in MM Docket No. 90-162, at 26 (filed June 14, 1990). The creation of a customized product reflects the incentive to carry on with a project

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55 See "TV Program Investor," Paul Kagan Associates, Inc., March 31, 1992 at 5.

56 See "TV Program Investor," Paul Kagan Associates, Inc., September 30, 1992 at 3. The combined programming budgets of these five networks went from $176 million in 1988 to $496 million in 1992.

57 Almost half of these series include 50 or more episodes. Id.

58 See, e.g., Fox Comments at 12-13; NBC Comments at 26. Given our emphasis on the market for programming, the Independent Stations' response, that only 60 percent of U.S. households subscribe to cable TV, is not persuasive. Independent Stations Comments at 6. Current levels of subscribership have been sufficient to create a new programming market.

59 Tentative Decision, 94 FCC 2d at 1095. See also J. Lippman, "The Humbled Peacock NBC; Network Struggles for Hits," Los Angeles Times, April 18, 1993, at D-1 (reporting that last year NBC "jettisoned some of its popular shows . . . such as 'In the Heat of the Night,' 'Matlock' and 'Golden Girls'. . . which "immediately were picked up by ABC and CBS").

into which both parties have sunk resources. See id. at 23. Finally, it is not uncommon that new and inexperienced suppliers will command lower prices for their product than established suppliers. Thus, in the absence of collusion among the networks -- which we have not found -- we conclude that the factors we cited in 1991 are insufficient to establish lack of inter-network competition.

50. We believe that the above-described evidence of purchasing patterns by Fox, cable networks, independent stations, and the three original broadcast networks themselves, demonstrates that the video marketplace has become more competitive with respect to the demand for programming. Moreover, as the number of program distributors, broadcast stations and cable services increases, the demand for programming will continue to grow, thereby providing producers with additional alternative buyers for their programming. Non-network program distributors already are beginning to purchase the quality programming previously sold only to the national networks. In this respect, we find that the market power of the networks vis-a-vis other purchasers of programming is limited. Moreover, inter-network competition serves as an additional constraint on any one network's ability to dictate terms in its overall dealings with the production community. Thus, we believe that a program producer that is not satisfied with the arrangement offered by a network has alternative purchasers for the product, and that the current market of alternative purchasers is sufficient to limit network market power over entertainment program acquisitions.[60]

51. Moreover, we are convinced that impediments to network purchase of financial interest and syndication rights have negative effects on the smallest, least established producers. The Court cogently argued that the first casualty of the financial interest rule is the small, unproven producer. Schurz, 982 F.2d at 1051. To the extent the networks are permitted to bid for financial interests in programs, the chances that this type of small producer can obtain financing is greatly improved. We disagree with the Coalition that new producers will be unable to obtain financing. First, contrary to the Coalition's speculation, we have no reason to believe that a network will ignore new producers in determining which producers it will finance, if it is allowed to re-enter the business of financing programs in return for back-end rights. Second, we find it highly unlikely that if the networks begin to compete with studios to provide financing, a studio's fear of losing a producer once that producer achieves success will discourage the studio from providing such financing. As savvy players in the market, the studios will no doubt conceive of

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[60] See D. Wharton and P. Noglows, "Fin de Finsyn Bash: A Surprise Party?" Daily Variety, Dec. 7, 1992, at 88 ("Marian Rees, an indie producer who specializes in telefilm deals, says she branched out to a new market due in part to the uncertainties of finsyn: cable. HBO, TNT and Lifetime 'are getting very aggressive in a positive way' in bidding for rights to programs, she says. Under deals Rees struck with HBO and TNT, the cable nets help her cover the early deficits in exchange for a percentage of back-end profits.").

effective strategies for retaining talent (e.g., by offering greater creative freedom than the networks or otherwise engendering loyalty to the studio). In any event, as ABC observed, a studio can use contractual devices to protect itself from giving a fledgling producer a "free ride"; thus, a studio's incentive to provide financing will not be lessened by the fear of losing such a producer to network in-house production. ABC Reply Comments at 5-6 n.8. Nor is there any credibility to the Coalition's claim that studios "nurture" new and aspiring producers, while networks do not.[61] Most commenters agree that permitting network ownership would increase the availability of financing for small, independent producers.[62]

52. On further reflection, we also agree with the Court's assessment that the 1991 constraints on network acquisition of back-end rights are inherently ineffective in preventing network extraction, even if the networks had the power to reduce overall prices paid to producers.[63] We have reviewed the first degree price discrimination theory presented in the economic studies submitted by the Coalition (the Warren-Boulton Declaration) and opposed by ABC (the Owen Reply Affidavit), and we do not agree that the rules prevent networks from extracting value at the license fee negotiation stage of the process. Under this theory, in the absence of finsyn rules the networks could pay only the minimum price that a producer is willing to accept (cost of production plus nominal profit) in return for both the network exhibition and back-end rights. We do not agree with the assumption that the network knows the minimum price the producer will accept for its program. This minimum price is not solely determined by the accounting cost of production. This price is also influenced by the other opportunities available to the producers (e.g., bids from cable networks or first-run programming bids by independent TV stations) and the other participants in the program's production (e.g., actors). The networks do not know this value with any degree of accuracy. In addition, neither the network nor the producer knows the value of the back-end rights with any certainty at the time that the network licenses a program for exhibition. Thus, there is no

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61 Coalition Comments at 8. The Writers Guild points out that "the term 'independent producer' is used within the production community to mean independent of the studios." Writers Guild Comments at 12-13 (emphasis in original). It notes that studio investments "diminish the independence of the independent producer," and that enhancing the position of the major studios "will not necessarily increase program diversity." Id. at 13-14. See also ABC Reply Comments at 5.

62 Although the Writers Guild favors special protections for producers unaffiliated with either networks or studios, it acknowledges that "[a]t least the producer would have four more doors to knock on" if the financial interest rules were lifted. Writers Guild Comments at 14. See also King World Comments at 4 (arguing that networks might be more experimental in programming decisions if they could share in back-end rights of off-network programs); AFTRA Reply Comments at 1-2 (asserting that the rules harm independent producers and limit diversity).

63 See also King World Comments at 4; NBC Comments at 18, 20.

reason to believe, with any degree of certainty, that producers are more fairly compensated for the potential value of the financial interest and syndication rights under the 1991 finsyn rules than they would be without those rules in place.

53. We also agree with the networks that the weight of the evidence supports the conclusion that, in practice, the financial interest constraints have proven ineffective, insofar as the production community has become increasingly concentrated under the finsyn regime since 1970.[64] In this context, the Coalition's assertion that we should measure diversity based on the number of "executive producers" lacks substance.[65] First, the Commission has never looked to the number of executive producers as the test for source diversity.[66] Second, the number of "executive producers"

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64 Concentration in prime time program producers continues to increase. In the 1991-92 season, the total number of suppliers -- 26 -- matched the 1985-86 season's all-time low. ABC Comments at 20; NBC Comments at 22. In 1989-90, the top 4 studios produced 46 percent of prime time network hours, and the top 8 produced 65.4 percent. By 1991-92, the top 4 produced 53.2 percent, and the top 8 produced 73.5 percent. During the 1991-92 season, over half the prime time hours were produced by 4 firms. NBC Comments at 23. In addition, more small, independent producers have folded since the 1991 finsyn rules were adopted: Sony/Columbia bought the assets of New World (producer of "The Wonder Years"); Imagine Entertainment and MGM have abandoned TV production; Orion sold its TV operations to Warner/Lorimar; Fries Entertainment went into bankruptcy; Grant Tinker dropped independent TV production reportedly because he did not want to be controlled by big studios; Studio Three Film Corp., Orbis Communications, LBS Communications, Blair Entertainment and Hanna Barbera have all declared bankruptcy or been sold. NBC Comments at 21-22; CBS Comments at 13, n.39.

65 Among other things, this argument appears to be internally inconsistent. If diversity ultimately is served by the number of creative people in executive positions, and regardless of copyright ownership, then network participation poses no threat. As the Coalition notes, "[t]here is no justification for ignoring [a] producer's creative autonomy -- and contribution to diversity -- simply because he or she chooses to affiliate with a non-network production company." Coalition Reply Comments at 6-7. The same logic should apply to a creative person who has chosen to affiliate with a network.

66 NBC Reply Comments at 4. For example, the 1991 finsyn rules identify as "sole producers" and "co-producers" entities that have copyright ownership, financial responsibility and production control. It makes no sense to apply a different standard when counting increases or decreases in the number of "producers." See CBS Reply Comments at 6. Moreover, focusing on the legal owner of the program is consistent with the Commission's historic approach to diversity in other contexts. We have, for example, adopted rules to limit the number of broadcast stations that a single entity can own, and to prohibit co-located broadcast-newspaper combinations. 47 C.F.R. § 73.3555. These rules are applied without regard to whether each

has increased due to factors that are not relevant to diversity, as contemplated by the rules.[67] The most telling measure of concentration is, in our view, the number of copyright holders of programming, not the number of individuals holding "executive producer" credits. As the networks cogently argue, the copyright holder is the person who has the ultimate control over the programming project and the contractual responsibility for delivering an acceptable program to the network. When viewed this way, the statistics clearly show a trend toward concentration in the production community since the finsyn rules were adopted.[68]

54. As stated earlier, we are also eliminating the 40 percent scheduling cap on network production of in-house programming. As explained in the next section of this decision, we have decided to preclude the networks from actively syndicating any programming domestically. Accordingly, one major incentive for producing a high proportion of in-house programming is eliminated, thus obviating the need for the cap. Moreover, we do not believe the competitive, multichannel marketplace gives the networks sufficient flexibility to convert wholesale to in-house productions, regardless of program quality. Thus, given these factors, we see no reason to retain this restriction. Furthermore, removal of the cap ensures that the diversity of programming that a particular network can itself provide to the overall market is not artificially diminished.

55. In sum, by eliminating the finsyn restrictions on network acquisition of financial interests and syndication rights in network

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communications medium at issue has its own autonomous day-to-day management team. Such an approach reflects the Commission's recognition that it is ownership that "carries with it the power to select, to edit, and to choose the methods, manner and emphasis of presentation." Multiple Ownership, 50 FCC 2d 1046, 1050 (1975), aff'd, FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775 (1978). See also Metro Broadcasting, Inc. v. FCC, 110 S.Ct 2997, 3012 (1990).

67 "Executive producer" credits have proliferated in recent years. For example, the average number of people serving in such capacity on CBS shows increased from an average of 1.17 in 1969-70 to 2.15 in 1992-93. In 1969-70, 82 percent of outside-produced shows had one executive producer. Today, 75 percent of shows have two or more executive producers. "Major Dad" has 4 executive procuders; "Good Advice" has 5. CBS Reply Comments at 7. See also ABC Reply Comments at 3. Additionally, there are more half-hour shows in network schedules, and therefore more "producers." In 1969-70, the networks had ordered 35 half-hour shows in network schedules; in 1991-92, the networks had planned to air 56 such shows. Also there has been a vast increase in the number of made-for-TV movies, leading to an increase in "producer" credits. CBS Reply Comments at 7.

68 While the Coalition raises various minor objections to discrete programs counted by the networks in applying their proferred standard for measuring concentration, the asserted errors or discrepancies are insufficient to change the overall conclusion.

programming, we have heeded the Schurz Court's criticism of our attempt in 1991 to justify continued regulation in this area. We thus have confronted the arguments against such regulation that come from various sources that the Court said we could not ignore,[69] including the Department of Justice, the Federal Trade Commission, and our own 1983 Tentative Decision. In doing so, we are unable to conclude that our 1983 Tentative Decision was "wrong from the start." Schurz, 982 F.2d at 1053. Nor are we able to point to any developments since 1983 that would justify an about-face from our conclusions at that time against any restraints on a network's acquisition of back-end rights in network programming. See id. The attempt to "do better in articulating [a] justification"[70] for this aspect of the 1991 finsyn rules has thus convinced us to depart from our 1991 decision and cease restraining a network's acquisition of financial interests and syndication rights in network programming.

56. While we have determined that direct restraints on network purchase of back-end rights are unnecessary -- based on our evaluation of the current market, as informed by the Court's objections to our earlier analysis -- this determination has an inherently predictive element. We cannot know to a certainty how the networks will behave until they are free to act. Accordingly, we believe that it is crucial to monitor developments in the market closely, to ensure that our predictions about network behavior and the effects of that behavior are accurate. To this end, we are retaining reporting requirements, tailored to our action today, which require networks to maintain semi-annual reports in their owned and operated stations' public files, setting forth specific information regarding, inter alia, programs which the network has produced or aired or in which it holds financial interests or syndication rights. Details of these reporting requirements are set forth below in Section E.

B. Network Syndication of Off-Network Programming

57. Upon further analysis and review, and as explained in detail below, we are amending our restrictions on network participation in the off-network program syndication market. In brief, networks operating in domestic markets now will be subject to the following syndication restraints: (1) networks may acquire domestic and foreign syndication rights in all off-network programming but may not actively syndicate such programming domestically, regardless of the production arrangement; and (2) networks must maintain semi-annual reports in their owned and operated stations' public files and with the Commission that certify compliance with the active domestic syndication ban and provide specific information on program acquisition and syndication activities. In addition, we will retain the 1991 rules' anti-warehousing safeguard. Also, due to the complete ban on active domestic syndication, we are repealing the 1991 rules' affiliate favoritism safeguard, as well as the 40 percent cap on in-house prime time

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69 Schurz, 982 F.2d at 1050-54.

70 Id. at 1050.

entertainment programming.[71] In foreign markets, networks can acquire syndication rights and can actively syndicate off-network programming without restriction. All remaining syndication rules, including the reporting requirements, will expire subject to guidelines detailed in Section F infra.

58. Background. The 1991 rules relaxed the Commission's restrictions on network participation in the program syndication business. In domestic markets, the rules allowed a network to syndicate actively its prime time entertainment shows that were produced "in-house" and aired on its own network.[72] However, the rules imposed a 40 percent cap on in-house prime time entertainment programming to deter the possibility that networks would produce most of their own prime time schedules.[73] Also, the rules permitted the networks to acquire syndication rights in off-network programming produced outside the network but required the use of an independent syndicator to distribute that programming.[74] In foreign markets, the 1991 rules allowed a network to have syndication rights in and to actively syndicate all off-network programming that has aired on any network, regardless of its production arrangement.[75]

59. The 1991 rules also included restrictions aimed at preventing the networks from favoring affiliates when actively syndicating their in-house programming and from delaying or "warehousing" the syndication of programming to the detriment of non-network stations. The anti-warehousing safeguard required a network to release into syndication a program for which it held syndication rights four years after the program's network debut or within six months following the end of the network run, whichever was

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[71] We will review any evidence of warehousing or affiliate favoritism during the review period following modification of the consent decrees. We reserve the right to retain warehousing restrictions or reimpose affiliate favoritism safeguards in the future, if necessary.

[72] See 47 C.F.R. § 73.659; see also R&O, 6 FCC Rcd at 3134-37. We defined "in-house productions" as "those network programs which are: (1) solely produced by the network; (2) co-produced by the network with foreign production entities; or (3) co-produced by the network with outside domestic production entities that initiate such arrangements." See R&O, 6 FCC Rcd at 3117.

[73] We also banned networks from actively syndicating each other's prime time programming because we were concerned that together they might control a share of the new off-network programs syndicated to local stations far in excess of the 40 percent schedule cap. See 47 C.F.R. § 73.659(c); see also R&O, 6 FCC Rcd at 3134-37.

[74] See R&O, 6 FCC Rcd at 3137.

[75] See R&O, 6 FCC Rcd at 3140-42.

sooner.[76] Additionally, networks were required to make syndicated off-network programming available to non-affiliates on terms and conditions no less favorable than those offered to affiliated or owned and operated (O&O) stations. Moreover, the rules presumed affiliate favoritism if a network actively syndicated programming to network O&Os and affiliates in more than 30 percent of the markets where a program was sold.[77]

60. In its review of the 1991 rules, the Schurz Court focused primarily on the issue of allowing the networks to acquire back-end rights in programming and less on the question of whether the networks should be allowed to actively syndicate programming in which they have obtained back-end rights.[78] Nonetheless, two of the issues the Court has asked the Commission to address on remand concern the syndication rules.

61. First, the Court sought to have the Commission address the findings and conclusions of its 1983 Tentative Decision, a portion of which implicates the syndication rules. In 1983, the Commission recommended eliminating the financial interest rule, retaining restrictions on the syndication of off-network programming (including an anti-warehousing safeguard) and sunsetting any remaining constraints by 1990. The Court directed the Commission on remand to explain any revisions to our 1983 approach, which would include any changes to our syndication restrictions.[79]

62. Second, the Court sought clarification of how our rules, including our syndication restraints, promote the Commission's diversity objectives. The Court speculated that increasing the number of program outlets and sources could be a means to program diversity. However, the Court questioned how our rules achieved this outcome and sought explanation why diversity (in its three forms) is a desirable objective.[80]

63. Remand Comments and Replies. With respect to the 1983 Tentative

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[76] See 47 C.F.R. § 73.660(c).

[77] See 47 C.F.R. § 73.660(b).

[78] The Court only briefly addressed the long-standing argument that networks acting as syndicators would take control of the program distribution market and drive competing non-affiliated stations out of business. Specifically, the Court speculated that if the networks, for anti-competitive purposes, refused to syndicate programming to non-affiliated stations, they would be getting nothing in return for their syndication rights and would be violating the antitrust laws. See Schurz, 982 F.2d at 1046. The Court subsequently suggested, however, that the Commission could properly be concerned if independent stations had little choice but to obtain off-network programming (which is an important revenue source for them) from "the networks with which they compete." Id. at 1055.

[79] Schurz, 982 F.2d at 1053-54.

[80] Schurz, 982 F.2d at 1054.

Decision, producer, independent station and syndicator interests contend that the 1983 decision supports the 1991 restrictions on the domestic off-network syndication market. They argue that the Commission's 1983 rationale for restricting the off-network syndication market (i.e., the restrictions are necessary to prevent the networks from using the program market to harm independent stations and promote their O&Os and affiliates) still applies today.[81] They further contend that the syndication and financial interest rules should be evaluated separately since the rationale for the financial interest rule (i.e., to prevent the networks from improperly extracting financial interests in programming) is unrelated to the rationale for the syndication rule.

64. The networks argue that the 1983 Tentative Decision undercuts the basic rationale for continued syndication restraints since the Commission found in 1983 that the risk of anti-competitive conduct by network syndicators was slight and therefore planned to eliminate all restrictions on off-network syndication by 1990. According to the networks, the Commission cannot reverse its 1983 determinations concerning competition and diversity without adequate explanation.[82]

65. On the question of how the syndication rules promote diversity, producer, independent station and syndicator interests argue that structural and behavioral safeguards must be applied to networks operating in the syndication market to protect the viability of non-network broadcast outlets. In this manner, they claim the 1991 rules foster outlet diversity, which is a means to achieving greater viewpoint diversity (i.e., more local media voices promotes the expression of diverse and antagonistic viewpoints). These parties claim that the syndication rule has spurred the development of a healthy and diverse syndication market, which in turn has supported the growth of independent stations. They believe that if the

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81 INTV contends the 1991 off-network restrictions are actually more lenient than those proposed in 1983. In particular, INTV notes that the 1983 decision would have retained a complete network ban on off-network syndication (at least temporarily), while the 1991 Rules allow the networks to actively syndicate up to 40% of their prime time entertainment schedule with in-house productions. Also, INTV argues the 1983 decision's proposed 1990 sunset of its off-network restrictions was based on the faulty prediction that alternatives for off-network programming would materialize by 1990. INTV claims the 1991 findings prove no such substitutes exist or will exist in the near term. INTV Comments at 4-6, 8-10.

82 ABC Comments at 24-26 and Reply Comments at 10-15; NBC Comments at 16-17. According to CBS, the 1983 decision recognized that concerns about network warehousing and affiliate favoritism were unjustified because networks would have to follow a non-profit maximizing course of conduct. CBS argues that the Commission temporarily retained the off-network restrictions to accommodate any residual concerns and provide for a period of transition. CBS further asserts that marketplace trends (e.g., lower network audience share, stronger independent stations) identified in 1983 as justifying a 1990 sunset have developed as predicted. CBS Reply Comments at 8-10.

networks enter the off-network syndication market without restrictions they can harm competing independent stations by warehousing attractive programs and favoring their affiliates in the supply of programming. These parties also believe that permitting the networks to actively syndicate in-house programming necessitates the 40 percent programming cap imposed in the 1991 rules to prevent the networks from producing their entire prime time schedule themselves.[83]

66. The networks, on the other hand, reject the idea that the syndication restrictions are necessary to prevent the demise of the independent stations, or that protecting the independents in such a manner promotes the diversity goals of the Commission. The networks contend that independent stations will not lack for quality programming given the success of the first-run programming market, the abundance of existing off-network programming on the market and the independent stations' decreased demand for such programs due to the growth of Fox. Also, they claim that even if the networks were inclined to funnel the most attractive off-network programs to their affiliates, independent stations would still have access to other programming substitutes, such as first-run shows.[84]

67. Decision. The domestic restrictions adopted today, like the 1991 rules, will permit networks to acquire financial interests and passive syndication rights in all off-network programming (See Section A supra for discussion on acquisition of back-end rights).[85] However, unlike the 1991 rules, we will not allow the networks to actively syndicate any off-network programming -- including in-house productions.[86] Thus, for both in-house

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83 Independent Stations Comments at 5-11, 17-19 and Reply Comments at 3-4; INTV Comments at 12-15, 19, 24 and Reply Comments at 2-4; King World Comments at 8-10 and Reply Comments at 5-6; and Coalition Reply Comments at 10, 16-17. INTV argues that if the 40 percent programming cap is eliminated, the Commission should prohibit the networks from any active role in the domestic syndication market. INTV Comments at 20.

84 ABC Reply Comments at 17-18; CBS Comments at 16-18 and Reply Comments at 8-15; NBC Comments at 23-27 and Reply Comments at 15-17. NBC argues that a network would have to obtain a sufficiently large share of off-network syndication rights over the course of several years to affect total supply and have any detrimental effect on the market. NBC Reply Comments at 15-17. ABC makes a similar argument. ABC Reply Comments at 10-15.

85 We will make no changes to our 1991 decision in the area of foreign syndication of off-network programming. Networks may continue to participate in this market without restriction (i.e., they may acquire foreign syndication rights in and may actively syndicate off-network programming, regardless of the production arrangement).

86 The complete ban on syndication precludes a network from syndicating another network's off-network shows. However, in view of our decision to remove all restrictions on the acquisition of financial interests, a network could hold passive syndication rights in another network's programming.

and outside productions, networks must use an independent syndicator to distribute off-network programming in which they have acquired ownership interests. The independent syndicator shall be completely insulated from the network with respect to any programming distributed for the network -- i.e., there shall be no contractual arrangements or understandings between the network and the distributor regarding the subsequent sale or scheduling of the syndicated program that would have the direct or indirect effect of affiliate favoritism.[87] In light of our decision to prohibit active syndication of prime time programming by networks, we have decided to eliminate the affiliate favoritism restriction. However, we will retain our anti-warehousing safeguard and certain reporting requirements described below (Section E). Finally, all remaining syndication requirements will expire according to the terms detailed below in Section F. We will now discuss specific aspects of our amended syndication rules.

68. Limits On Active Domestic Syndication. Until the rules expire, a complete ban on networks acting as syndicators of all off-network programs in the domestic market is beneficial because it simplifies the rules (i.e., there is no need for a 40 percent schedule cap or an administrative regime to police affiliate favoritism) while satisfying our goals of fostering diversity and competition. Our 1991 rules granted the networks more comprehensive syndication rights for in-house programming than programming that is produced outside the network. Those rules thus created an incentive for networks to air only in-house programming in prime time. As a result, we were forced to impose other restraints -- the 40 percent prime time schedule cap and the prohibition on networks actively syndicating each other's in-house programming to prevent circumvention of the programming cap. These additional restraints led the Schurz Court to criticize the rules as being unwieldy and unduly restrictive. As now crafted, our limits on active syndication are both more manageable and do not infringe on the networks' programming prerogatives by limiting the composition of their prime time entertainment schedule to no more than 40 percent in-house productions. We also note that, although we are returning to a more restrictive version of our domestic off-network syndication rules, the networks in fact will be in the same situation under our 1993 rules that they have experienced since our 1991 rules were adopted. This is because the provisions in the consent decrees that mirror our 1970 rules have remained in effect, thus negating any practical consequences of our 1991 liberalization of the off-network syndication rule.[88]

69. We are mindful, however, that with respect to syndication of in-house programming, the new rules are more restrictive than the 1991 rules. That is, the new rules prevent networks from actively syndicating programs produced in-house. However, today's revised approach is appropriate in light of our decision to substantially lift restrictions on network

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[87] The Commission may consider complaints if a party can make a showing undermining the credibility of the "independence" of such a syndicator.

[88] See, e.g., United States v. American Broadcasting Companies, 45 Fed. Reg. 58441 (1980).

acquisition of programming ownership rights. Subject to appropriate modification in the consent decrees, networks may acquire ownership interests in all off-network programming and in first-run programming that they produce themselves (see discussion infra in Section C on first-run). This new freedom will provide them with greater opportunities in the programming marketplace. We therefore want to move more cautiously in granting the networks companion program distribution rights to ensure that quality programming continues to flow to non-network broadcast outlets during this period in which we are removing the financial interest restraints and preparing for a final review of the remaining restrictions.[89]

70. Our revised off-network syndication restraints are fully supportable despite the Court's concerns regarding inconsistencies between the 1983 Tenative Decision and the 1991 R&O. Specifically, our decision today, which will provide us with a base of experience from which we may evaluate the networks' conduct in advance of the sunset of all syndication restrictions, is consistent with our 1983 approach to deregulating the off-network syndication market. Indeed, the Tentative Decision itself reflected the Commission's uncertainty about how even a more narrow relaxation of the syndication restrictions would affect the programming marketplace. As the Commission noted in 1983, such uncertainty warranted caution in changing the domestic syndication rule:

> [W]e have tentatively concluded that some restrictions may be necessary because we cannot be completely certain network participation in the syndication market would not result in competitive injury to the independent television segment of the industry and thus to the viewing public. While the chances of such injury . . . do not appear to be large, we are entering a period in which the increasing economic strength of the non-network segment of the television industry is making the television industry significantly more competitive and increasing the programming options available to the public. It is extremely

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89 In 1991, we indicated that limited network entry into the syndication market would help us to assess the actual impact of such entry when the rules were reviewed four years later. That approach, however, was predicated on permitting networks only limited relief from the financial interest rule, including the prohibition on network ownership of back-end rights. See R&O, FCC Rcd at 3134-35. Upon further review, we conclude that a bifurcated regulatory regime, in which the networks are permitted to syndicate some prime time programs but not others, would be excessively difficult to administer. Under the new rules, we are confident that our reporting requirements (described infra in Section E) will enable us to monitor network behavior with respect to the acquisition of programming, the use of independent syndicators and the syndication of programming in foreign markets. Furthermore, as set forth below, our final review of the remaining restrictions is designed to elicit specific information about the networks' behavior as new participants in the programming marketplace. Evidence of abuse would weigh against network entry into the syndication market at the time of our scheduled review of these rules. See discussion infra in Section F.

> important that progress in this direction not be impeded . . . [I]t is possible that networks, acting as syndicators of off-network programming, would fail to support these developments as vigorously as unaffiliated syndicators. While our economic analysis suggests that this would generally not be a profit maximizing course of conduct to follow, it is nevertheless a matter of sufficient concern to warrant some regulatory involvement.

Tenative Decision, 94 FCC 2d at 1097. Thus, as in 1983, we will retain a complete ban on active network participation in the off-network syndication market for a limited period of time to accommodate any residual concerns regarding network dominance of the off-network programming market, and provide for a period of transition to a potentially less regulated and more competitive environment.

71. The networks believe the Tentative Decision supports immediate repeal because the decision proposed a sunset of all syndication restrictions by 1990 and marketplace trends today only further justify repeal. Since the proposals of the Tentative Decision were tentative only, and never became a final order, however, we do not view that action as indisputable support for immediate repeal of all syndication restraints today. We also point out that while we predicted in the Tentative Decision that 1990 would be an appropriate time to repeal our syndication restraints, we also sought to move cautiously on the matter. Specifically, we emphasized that with respect to the syndication rule, our conclusions were less definitive than those concerning the financial interest rule. We therefore asked for additional comment and proposed that total repeal be preceded by a seven-year period of transition, which would allow further evaluation of the syndication marketplace and permit us to see how the networks responded to their new opportunities for obtaining financial interests in programming. Significantly, we did not have the seven-year period of review because the Tentative Decision was never implemented.

72. We are aware that the market trends since 1983 demonstrate that the programming marketplace has continued to evolve.[90] Accordingly, we are prepared to put in place a shorter transition period for repeal than we recommended in 1983 once the consent decrees governing network entry into the financial interest and syndication areas are modified. Thus, rather than the seven-year period recommended in 1983, we have scheduled the remaining syndication restraints to expire two years after the relevant provisions in the network consent decrees are modified. The terms of expiration are detailed infra in Section F.

73. Having answered the Court's concerns about the Tentative Decision's relationship to our revised syndication rules, we now turn to the

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90 See, e.g., PPDC Comments at 4 (indicating that the number of syndicated program distributors has increased 50% from 1982 to 1990); NBC Reply Comments at 10 (indicating that 14 of the top 20 syndicated programs were first-run shows in the 1991-92 season).

question of diversity. The Court raised particular concerns about whether our rules are designed to enhance broadcast diversity.[91] We believe that the syndication restraints adopted today will operate in the best interests of source, outlet and program diversity.[92] In particular, our decision on syndication rules advances the interests of outlet diversity. Historically, the principle behind our network syndication restraints has been to ensure that alternative, non-network broadcast outlets receive access to the quality programming that they need to survive. We have been concerned that networks acting as syndicators would unfairly influence the program distribution market to the benefit of their affiliates and the detriment of competing independent stations. Based on continuing marketplace trends and the overall record on this issue in response to the Further Notice, we anticipate that outlet diversity could be maintained once the remaining syndication restraints are removed. However, before we remove all restrictions, we want to be certain that such an action will not harm local independent stations. For we are concerned that the harm that may result if we are wrong, would most greatly affect independent stations and the significant role they play in providing service to the public.[93] We therefore take the cautious approach adopted today. We emphasize that we will monitor network activities with respect to the acquisition of back-end rights in off-network programming, and we may consider abuse in that area to weigh against future repeal of the syndication restraints.

74. We add that our concern about broadcast diversity goals is rooted in the core principle that in a democratic society the "widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public. . . ."[94] Our preferred means of achieving such diversity is through the promotion of source and outlet diversity. Regulation that fosters the growth of more program outlets leads to the expression of more viewpoints without directly involving the Commission in broadcaster's programming decisions. We believe that efforts to promote outlet diversity also enhance source diversity, because an

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91 The Schurz Court's characterizes "reruns" as the "antithesis of diversity." See Schurz, 982 F.2d at 1055. However, we believe such programming does contribute to program diversity. In particular, we accept the independent stations' contentions that they use revenues received from their counterprogramming strategies to subsidize other local programming, such as news and public affairs shows. Such efforts further enhance program diversity. See Independent Stations Comments at 8.

92 As explained in detail supra, our elimination of all restrictions on the acquisition of financial interest and passive syndication rights in off-network programming will enable the networks to act as another source of financing and production assistance to independent producers, thereby fostering diversity of program sources.

93 See R&O, 6 FCC Rcd at 3125.

94 See Tentative Decision, 94 FCC 2d at 1053 (quoting Associated Press v. U.S., 326 U.S. 1, 20 (1943)).

increase in the number of financially secure stations in a market increases demand for programming. Thus, while the promotion of each type of diversity is therefore independently justified under the rubric of the public interest, by promoting outlet diversity, the three principles work together to provide a robust programming market.

75. Warehousing. We now turn to a discussion of warehousing. Warehousing, in general, consists of the networks withholding programs from the syndication market. Some commenters to the Second Further Notice, especially Independent Stations and INTV, are concerned about warehousing, arguing that if the networks withhold even a few popular network programs from syndication, non-network stations will be harmed. On the other hand, the networks argue that they cannot harm independent stations by warehousing programs unless they can effectively act in collusion and corner the supply of off-network programs, any off-network alternatives and first-run programming. We find that the ban on active syndication by the networks will not completely ameliorate our concerns of the harm warehousing could do to independent stations. Accordingly, we are retaining the 1991 rule, which essentially prohibited a network from holding a program out of syndication for more than four years.[95]

76. In the 1991 R&O, we expressed concern that networks might warehouse off-network programs and thereby make it difficult for independent stations to purchase popular off-network programming essential to their competitive viability.[96] We have long been concerned with ensuring that independent stations have access to off-network syndicated programming, and that such access potentially could be thwarted by warehousing.[97] The commenters' disparate views reflect, in part, different understandings of what is meant by use of the term "warehousing." Specifically, in 1983 our reference to warehousing focused our concern on whether the networks could withhold programs "in order to increase the price of those programs which are aired. . . ."[98] We concluded then that the risk of this form of warehousing was sufficient to warrant an anti-warehousing provision.[99] By 1991, however, we were persuaded by the networks' argument that this form of warehousing was not possible unless the networks could collude and effectively control the supply of off-network and first-run programming.[100]

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95 Specifically, the 1991 rule required a network to release into syndication a program for which it held syndication rights four years after the program's network debut or within six months following the end of the network run, whichever was sooner. See 47 C.F.R. § 73.660(c).

96 See R&O, 6 FCC Rcd at 3132-34.

97 See Tentative Decision, 94 FCC 2d at 1100; R&O, 6 FCC Rcd at 3132-33.

98 Tentative Decision, 94 FCC 2d at 1096.

99 Tentative Decision, 94 FCC 2d at 1097.

100 R&O, 6 FCC Rcd at 3133.

We cited no credible evidence then, and we find none now, that warehousing for the purpose of manipulating prices in the syndication market as a whole will occur.[101]

77. However, we were concerned in 1991, and we remain concerned now, that the networks for other reasons could engage in a different form of warehousing that could harm independent stations and their ability to compete effectively in their respective local broadcast markets. We refer here to the possibility that the networks could unreasonably delay the commencement of syndication of a few popular, current network programs.[102] Such conduct, with its attendant adverse effects on the competitive posture of independent stations, could undermine outlet diversity. We believe that outlet diversity is best served when independent stations have an abundant, ongoing supply of popular off-network programming.[103] Even in the presence of the finsyn rules we adopt today, the networks could have an incentive to withhold popular programs from the syndication marketplace during the two-year period following modification of the consent decrees, in order to maintain the exclusivity of the original network run.[104]

78. As explained above, the prohibition on active syndication by a network guards against affiliate favoritism that would improperly deny independents' access to off-network programs. That prohibition would not, however, prevent a network from withholding a program from syndication if it decides not to release the program to the independent syndicator for syndication while the program is still in its network run. Independent stations are understandably concerned if their access to important programming is under the control of the networks, with whom they compete.[105] Although the record evidence is mixed, we are not prepared at this time to

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101 See DOJ Comments at 32-34 (filed June 14, 1990). In any event, the Department of Justice has argued that it is highly implausible the network could form a syndication cartel that would be beyond the reach of antitrust enforcement. See also supra Sections A and C, regarding the competitive nature of the programming market.

102 See Independent Stations Comments at 8; INTV Reply Comments at 6-7.

103 See also supra note 91 (discussing importance to independent stations of revenues derived from broadcast of off-network programs).

104 See Statement of Laurence Tisch, En Banc Hearing Transcript at 66 (December 14, 1990). On the other hand, we acknowledge evidence in the record that networks could have an economic incentive to syndicate programs because it increases their ratings during the network exhibition. See CBS Reply Comments at 15 and n. 61. In addition, withholding syndication for too long would dissipate the value of the network's interest in the program. A network that withheld an off-network series from syndication, or delayed its entry into syndication beyond the optimum time, would be sacrificing syndication revenues it paid for when it bought the syndication rights.

105 See Schurz, 982 F.2d at 1055.

risk the denial of independent stations' access to such programming until we have had the opportunity to review how the networks behave in response to their renewed freedom to acquire financial interests in programs. We thus will retain the anti-warehousing rule, subject to our review and sunset terms discussed in Section F infra.[106] We also will monitor network behavior in this regard through our reporting conditions. See infra Section E.

79. In 1991, we balanced the networks' right to exclusive use of their programs for a period of time with the need to ensure that they could not unreasonably delay the release of programs into syndication.[107] We continue to find that balance appropriate. Accordingly, we will still require networks to release a program, for which it holds the syndication rights, into the syndication market four years after the program's network debut or within six months following the end of the network run, whichever is sooner.

80. Affiliate Favoritism. We also expressed concern in 1991 that the networks acting as off-network syndicators would have both the incentive and the ability to favor their affiliates in particular markets to gain not only an immediate revenue benefit, but also a long-term competitive edge in those markets. Independent stations, INTV and independent syndicator commenters to the Second Further Notice are concerned that such behavior would interrupt the flow of quality off-network programming to unaffiliated broadcast stations and effectively put such stations and non-network syndicators out of business. The networks counter with the argument that, like warehousing, networks cannot use affiliate favoritism to their competitive advantage. They argue that intense competition in the syndication market, along with effective substitutes for off-network programming, make affiliate favoritism unlikely.

81. We have decided to repeal the express affiliate favoritism prohibitions in the 1991 rules. We find affiliate favoritism safeguards unnecessary in view of the fact we are keeping the networks completely out of active domestic syndication for the time being and plan to monitor their programming acquisition activities carefully during this period. We therefore find that layering this additional behavioral restraint on top of our structural safeguards against active off-network syndication is

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106 This is consistent with certain consent decree provisions that are not addressed in the networks' modification requests. Specifically, the consent decrees presently prohibit the networks from withholding (i.e., through some sort of contractual exclusivity clause) a program in which it does not have a financial interest from syndication for more than four years after its network debut. See e.g., United States v. American Broadcasting Companies, 45 Fed. Reg. at 58443, para. VI (e)(ii)(b) (1980). This particular restriction expires by its own terms in 1995 and is not one of the provisions that the networks have asked to be modified in the ongoing consent decree proceeding. See discussion on consent decrees infra in Section F. Thus, until 1995, networks are prohibited from warehousing programming in which they do not have an interest.

107 R&O, 6 FCC Rcd at 3136.

duplicative. Thus, it would be especially difficult for networks -- operating through an independent syndicator -- to exercise substantial control over the supply of off-network programming and therefore successfully use an affiliate favoritism scheme in the off-network market. However, we will monitor the situation via reporting conditions to ensure that such abuses do not occur.

82. Without the syndication ban, we believe that there is a risk that the networks could engage in affiliate favoritism. For example, by steering an off-network "hit" to an affiliate, the network engenders goodwill with its affiliate and presumably helps the performance of that station, which may help to boost overall network ratings.[108] The potential for this market behavior further supports our decision to prevent active syndication.

83. Finally, with respect to the Court's concerns, our decision today to eliminate the express affiliate favoritism provisions contained in the 1991 rules is consistent with our 1983 Tentative Decision. While the Tentative Decision fully analyzed the issue of network warehousing, the decision did not discuss affiliate favoritism at length, nor did our 1983 proposed rules contain an express affiliate favoritism safeguard.[109] We did, however, retain syndication restraints in 1983, which as expressed supra, is consistent with our decision today. Also, as expressed supra, our decision to eliminate the affiliate favoritism safeguards does not undermine our diversity goals since we are retaining structural safeguards in the interests of outlet diversity during this period of transition.

C. Network Participation in the First-Run Programming Market

84. As explained below, we are retaining the 1991 restrictions on network participation in the domestic first-run programming market. Thus, in the domestic market, networks may only acquire financial interests and syndication rights in programming that is solely produced in-house, and they may not actively syndicate any first-run programming domestically. For first-run programming distributed in foreign markets, regardless of the production arrangement, networks are permitted to acquire financial interests and syndication rights and to actively syndicate such programming. However, the domestic restriction prohibiting network involvement in first-run programs not produced solely in-house precludes any such foreign interests, rights or activities if the program is a co- or outside production and is distributed in the United States. Stated another way, a network can only hold financial interests or syndication rights in, or actively syndicate, a co- or outside production of a first-run program if the distribution of that program occurs solely in foreign markets. By the same token, since a network can hold financial interests and passive domestic syndication rights in first-run programs that it produces solely in-house, it can also actively syndicate such a program in foreign markets

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108 See Comments of Capital Cities/ABC in MM Docket No. 82-434 at 13 (filed March 23, 1992).

109 See generally Tentative Decision, 94 FCC 2d 1019 (1983).

even if the program is distributed domestically.[110]

85. Background. The 1991 rules allowed limited network entry into the first-run syndication market. Under these rules, networks operating in domestic markets could own back-end rights in first-run programs that they solely produced in-house. Networks were required to use an independent syndicator to distribute such programming.[111] Networks could have no interests in, nor syndicate, any first-run programming that was a co- or outside production. In foreign markets, networks could have interests in and could actively syndicate first-run shows distributed entirely outside the United States, regardless of the production arrangement.[112] However, networks could not acquire back-end rights in foreign first-run programming produced by outside sources or co-produced if that program was also distributed in the United States, nor could the networks actively syndicate such programming.[113] As discussed in Section B, supra, the Schurz Court paid less attention to these syndication matters, including the treatment of first-run syndication by our 1991 rules. Nonetheless, we address the Court's concerns regarding the 1983 Tentative Decision and diversity in the context of our first-run syndication rules.

86. Remand Comments and Replies. On the question of the treatment of the 1983 Tentative Decision, producer, independent station and syndicator interests assert that the 1983 decision, which recommended repealing all first-run syndication restrictions, did not fully evaluate network participation in the first-run market and therefore cannot be viewed as contradicting the 1991 decision to retain first-run restrictions. They believe that the more complete record compiled in the 1991 proceeding supports restrictions on the networks participating in the first-run syndication market.[114] The networks counter that the 1983 Tentative Decision expressly dealt with the issue of allowing networks into the first-run syndication market by limiting syndication restrictions to the distribution of off-network, prime time entertainment programming.[115]

87. With respect to the issue of first-run restrictions promoting diversity, the producer, independent station and syndicator interests

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110 As discussed in Section E, infra, networks must also comply with our revised reporting requirements.

111 See 47 C.F.R. § 73.659(b); see also R&O, 6 FCC Rcd at 3146.

112 See R&O, 6 FCC Rcd at 3140-42; see also MO&O, 7 FCC Rcd at 356 n.56, 374-75.

113 See R&O, 6 FCC Rcd at 3140-41, 3146.

114 Independent Stations Comments at 23-26 and Reply Comments at 13-14; King World Comments at 2-3; PPDC Comments at 13-14.

115 ABC Reply Comments at 10-15, 15-17; CBS Reply Comments at 8-10; and NBC Comments at 16-17 and Reply Comments at 14, 19.

emphasize the value of this form of programming to independent stations and the fact that this form of programming is particularly susceptible to network control.[116] In short, they believe that if networks are allowed to enter the first-run market without restriction they will harm competing independent syndicators and stations by favoring their affiliates in the supply of such programming.[117] The networks generally oppose first-run syndication restraints on the grounds that there is sufficient competition in the marketplace to prevent any network manipulation of the first-run market.[118] In addition, the networks stress that permitting their entry into this aspect of program production and distribution will increase the amount of first-run programming, provide more programming choices to all types of stations, independent and network-affiliated alike, and will thus serve to increase both source and outlet diversity goals.[119]

(1) Acquisition of Back-End Rights In First-Run Programming

88. Decision. We will continue to permit networks to hold financial interests and syndication rights in domestic first-run syndication only in programming produced solely in-house. In addition, for first-run syndication of programs distributed entirely outside of the United States, we will continue to allow the networks to acquire financial interests and syndication rights in any programming, whether produced solely in-house, as a co-production or by an outside entity.[120]

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116 Independent Stations Comments at 9-11 ; INTV Comments at 25; King World Comments at 5-6 and Reply Comments at 5-8; and PPDC Comments at 2-4; Coalition Comments at 16-18.

117 King World argues that first-run programming is especially susceptible to network control. According to King World, this type of programming needs access to the top markets in order to be successful. Therefore, the networks could easily use their ownership or affiliation with broadcast stations in the top markets to launch first-run programming and eventually take over the market. King World Comments at 8-10. Networks on the other hand, point out that the leading independent station groups also own major market stations. See CBS Reply at 17; Fox Reply Comments at 13.

118 ABC Reply Comments at 16-17; CBS Reply Comments at 16; and NBC Reply Comments at 19. Fox questions whether access to the networks O&O in the top markets is indispensable to the success of new first-run programming. Fox believes there are many other outlets in these markets, including group-owned stations, that offer producers alternatives for launching new programming. Fox Reply Comments at 9.

119 See, e.g., CBS Reply Comments at 16-17.

120 By the same token, if such programming is syndicated both domestically and abroad, the domestic restrictions on first-run programming apply so as to prohibit all network involvement in outside or co-productions, and to permit network involvement -- including active syndication in foreign markets only -- in first-run programs produced solely

89. In 1991, we found that we should provide the networks with some flexibility with respect to entry into the increasingly competitive first-run production market.[121] Thus, for the domestic market, in the 1991 decision we permitted the networks to produce such programming solely in-house and retain the financial interest and syndication rights in their own programming. We retain that regulatory scheme here.[122] We believe that approach is appropriate in light of the unique characteristics of and concern over the first-run market, coupled with the public interest benefits of proceeding cautiously during this time of transition to a non-finsyn regime. As we have emphasized, the first-run syndication programming market is an alternative to the network program distribution system.[123] It provides another avenue for a producer to sell its programming to television stations and reach viewers. Yet, this market functions in a manner different from the network distribution system. In particular, the success of a program produced for the first-run market is contingent, first, on clearances by the most powerful stations in the top few markets, and, second, on clearances in a large number of markets throughout the country. The first step is a prerequisite to the second, and the major networks are uniquely positioned -- because they own powerful stations in virtually every major network and have significant influence over a web of affiliates serving the entire United States -- to achieve both steps in much more expeditious and efficient fashion than any other competitor. During the phase-out period of finsyn restrictions, we believe it necessary to ensure the widest possible opportunities for first-run, non-network production entities. Moreover, we believe that the limitations we are retaining serve as a counterbalance to the lifting of similar restrictions for network programming, permitting us to evaluate the relationship between networks and outside producers at the time of our final review.

90. In 1991, the Commission lifted restrictions on network acquisition of back-end rights in first-run programming that would be syndicated in foreign television markets. This decision reflected our desire to permit the networks to compete in the ever-increasing international market for television programming.[124] We adhere to that rationale and so make no changes to our 1991 decision in this area.

91. While the Court expressed concern that the 1991 rules generally

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in-house.

121 R&O, 6 FCC Rcd at 3146.

122 We note that the Commission, in its 1991 decision, stated that network-produced first-run programming will be considered network programming for purposes of the prime time access rule. R&O, 6 FCC Rcd at 3146. We make no change to that decision here.

123 See, e.g., supra paras. 46-47.

124 See R&O, 6 FCC Rcd at 3140-41.

contradicted aspects of the Tentative Decision, we note that the Commission in 1983 did not specifically discuss the first-run programming market. There, the Commission made clear that its concerns focused on prime time entertainment programming. After focusing here more extensively on the first-run syndication marketplace and developments in that marketplace since 1983, we believe that the record supports continued caution to avoid potential negative effects of immediately lifting all restrictions on network participation in the first-run programming market.

92. The Court also questioned how our decision affected diversity. The decision to permit the networks to produce and retain interests in first-run programming will provide an opportunity for several additional entities to enter this market and increase source diversity. The pre-1991 rules precluded networks participation in first-run program production. We believe that it is appropriate to add network voices to this marketplace. An increase in the number of producers in the marketplace should add to the amount of available product for existing stations and, perhaps, new stations, thus maintaining, if not increasing, outlet diversity.[125] We further believe that by permitting limited entry by the networks during the period prior to the sunset of these rules, we can monitor any concerns regarding potential abuses that would contravene our intent to increase the diversity of the program production marketplace.

(2) Participation in the Syndication of First-Run Programming

93. Decision. Under the rules we adopt herein, networks continue to be precluded from actively syndicating any first-run programming in the United States. While they will be permitted to hold financial interests and syndication rights in programs that are produced solely in-house, such programming must be distributed in the domestic syndication market by an independent syndicator, subject to the reporting requirements described in Section E, infra, but may also be distributed by the networks themselves in foreign markets. With respect to other first-run programs (i.e., those not produced solely in-house by a network), we place no restrictions on the networks' syndication activities, so long as these programs are syndicated exclusively outside the United States.

94. With respect to the domestic first-run programming market, we retain the same regulatory scheme we adopted in 1991.[126] At that time, the Commission found that it was appropriate to proceed with some caution in lifting restrictions on network participation in first-run syndication. In

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125 A staff analysis indicates that the supply of first-run syndicated programs distributed in the domestic marketplace actually declined from 364 programs in November 1983 to 269 shows in November 1990. However, the demand for such programming has increased as evidenced by the growth in the number of markets where the average first-run syndicated program is being sold. In November 1983, the average first-run program was distributed to approximately 30 television markets. That number was about 62 markets in November 1990.

126 See 47 C.F.R. § 73.660(a)(2).

particular, based on the record, the Commission believed that a continued prohibition of active syndication of first-run programming was necessary because: (1) local broadcast stations need an unimpeded supply of first-run programming to compete with network and off-network programming in various non-prime-time periods; (2) allowing the networks into first-run syndication could enable them to exploit their owned and operated stations and their web of affiliates serving the entire United States to handicap the launch of new first-run programs by independent syndicators, which would be detrimental to the maintenance of a diverse, competitive marketplace; (3) allowing the networks into first-run syndication could undermine the objectives of the prime time access rule; and (4) by virtue of the market structure, network involvement in first-run syndication could diminish the amount of independent first-run programming aired on local television stations.[127] We continue to be concerned with these matters, although we are prepared to recognize that the need for restrictions could, if present trends continue, abate in the near future. Thus, at this time, even where network ownership of rights in first-run programming is permitted by the rules, the networks will not be allowed to actively syndicate such programming. We believe that requiring that an independent distributor syndicate this programming will provide a layer of protection against network interference with their affiliated stations' programming choices and allay any concerns of affiliate favoritism during the transition to a non-finsyn environment.

95. The 1991 rules lifted the restrictions on the networks' ability to syndicate first-run programming in foreign markets. This modification was intended to increase the competitiveness of the networks in the international marketplace and to provide them with additional relief they requested.[128] In the domestic market, we continue to want to guard against the possibility that the networks could favor their owned or affiliated stations in the sale of such programming over other stations. The successful launch of a first-run syndicated program is greatly affected by the ability of the distributor to sell a program to a large number of stations, especially stations in the major markets that reach a high proportion of the total number of television households. The networks can affect the purchases of such programs through their owned and operated stations that are located in major television markets, coupled with their affiliate arrangements with stations serving the vast majority of the country. Independent syndicators do not have such ability, even those that are owners of broadcast station groups. Such distributors do not always own stations in the two or three largest markets and, more significant, they lack the ongoing relationship with other stations that the networks have with their affiliates. Accordingly, we believe that it is appropriate to proceed cautiously in this regard and require independent syndicators to sell and distribute first-run programming produced by the networks for domestic viewing. We anticipate that we will be able to determine the accuracy of these beliefs once we have actual experience with network participation in the programming market under the new financial interest

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127 R&O, 6 FCC Rcd at 3144-45. See also MO&O, 7 FCC Rcd at 378-80.

128 R&O, 6 FCC Rcd at 3140-41.

regime. We will specifically examine the networks' conduct in that side of the market as part of our final review of the rules in advance of their expiration.

96. The potential for anti-competitive behavior is not relevant to the case of programming syndicated overseas because the purchasers of first-run programming in those markets are neither stations owned by nor affiliated with the networks or their competitors. Thus, it does not appear reasonable to impose regulatory impediments on network participation in this additional revenue source. However, first-run programs that are also syndicated in the United States implicate our concerns over network behavior in the domestic market, and we therefore apply our domestic restrictions in such cases.

97. In response to the Court, we observe that while the 1991 first-run syndication rules are more restrictive than the approach proposed in the 1983 Tentative Decision (which would have removed first-run constraints), the Commission's action in 1983 contained no specific analysis or record regarding the first-run programming market. Our current analysis of the more complete and updated record on this issue leads us to conclude that concerns regarding network involvement in the first-run market justify proceeding more cautiously than we recommended in 1983. In this regard, we note the Court's skepticism regarding the ability of the networks to control the program distribution market and drive competing non-affiliated stations out of business.[130] With respect to domestic first-run syndicated market, however, we believe that the distinctions in the first-run market and our concern over protecting the outlet diversity that independent stations bring to the market, justify our waiting to see how the networks respond to their new opportunities to engage in acquisition and syndication of programming before removing all finsyn constraints.

98. In addition, the Court expressed concern about the effect of our regulatory scheme on several types of diversity. As we have noted, the syndication rules are designed to foster outlet diversity specifically. Because the networks will not be permitted to engage in any active syndication in the domestic television market, the fear that they could deprive local television stations, especially non-affiliated stations, of the important programming on which they depend is dispelled. By prohibiting network acquisition of back-end rights in the first-run programming of outside producers, we preclude any network influence on the sale of such programming. Moreover, independent syndicators will have to distribute any in-house first-run programming. Our reporting requirements will allow us to monitor the independent syndicator to ensure that there is no favoritism towards the networks' owned stations or affiliates that would be detrimental to other stations and affect outlet diversity. Accordingly, we conclude that this decision satisfies the Court's diversity concerns in this respect.

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130 See Schurz, 982 F.2d at 1046.

D. The Definition of "Network"

99. For purposes of the finsyn rules (and the prime time access rule), our 1991 rules defined "television network" as any entity that provides more than 15 hours of prime time programming per week to affiliates reaching 75 percent of television households nationwide.[131] While we are not amending this definition, we are today adopting rules that exempt "emerging networks" from most of the finsyn requirements.[132] We will treat an entity as an "emerging network" if it does not qualify as a network under our Section 73.662(i) definition (now redesignated as Section 73.662(f)) as of the effective date of the rules adopted today, even if it subsequently meets this definition.[133] As discussed below, adoption of an "emerging network" exemption removes a significant impediment to the development of competition with the major networks, and will precipitate an increase in the amount of programming available to broadcast stations not affiliated with these major networks. Moreover, it preserves a degree of competitive equilibrium in the video marketplace as we move into a period of substantially relaxed rules and, once the network consent decrees are modified, make a transition to no finsyn restrictions. We stress, however, that the exemption is not total.

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131 47 C.F.R. § 73.662(i) (1991). This Rule in its entirety defines a television network as "any person, entity, or corporation providing on a regular basis more than fifteen (15) hours of prime time programming per week (exclusive of live coverage of bona fide news events of national importance) to interconnected affiliates that reach, in aggregate, at least seventy-five (75) percent of television households nationwide; and/or any person, entity, or corporation controlling, controlled by, or under common control with such person, entity, or corporation. Not included within this definition is any television network formed for the purpose of producing, distributing, or syndicating program material for educational, noncommercial, or public broadcasting exhibition, or for non-English language exhibition, or that predominately distributes programming involving the direct sale or products or services." Id.

132 We have previously stated that we would not revisit or revise the prime time access rule (PTAR) in this proceeding, and for this reason we decline to extend the "emerging network" exemption to the PTAR context. See Further Notice of Proposed Rule Making, 5 FCC Rcd 6463, 6469 (1990). Thus, pursuant to Section 73.662(i) of our Rules (now redesignated as Section 73.662(f)), PTAR will continue to apply to television networks once they pass the 15 hour network programming threshold. However, we are retaining notes 3 and 4 to Section 73.658(k) of our rules. Note 3, for example, provides that programming distributed by an entity prior to becoming a network, and subsequently produced episodes of a series first exhibited by that entity prior to becoming a network, are not network programming for purposes of these rules. See 47 C.F.R. § 73.658(k) Note 3.

133 Obviously, if an entity does not meet the Section 73.662(i) (now redesignated as Section 73.662(f)) definition, it is not subject any finsyn requirements.

We will require emerging networks to comply with the reporting requirements (set forth in Section E, infra), once such a network provides 16 hours or more of prime time programming to interconnected affiliates.

100. Background. In the Schurz decision, the Court questioned whether a network definition based on an hourly prime time programming cap perversely limits competition with the established networks by discouraging emerging networks, such as Fox, from programming to full capacity. The Court noted that application of our definition could also weaken Fox's incentive to furnish prime time programming to the traditionally weak independent UHF stations that are affiliated with it. The Court observed that the definition may therefore be operating contrary to the Commission's goals of promoting competition and diversity.[134]

101. Remand Comments and Replies. Fox and Fox Affiliates argue that while there is no basis for applying the finsyn rules to any broadcast network, application of these rules to emerging networks such as Fox is particularly inimical to our goals, because the restriction creates a disincentive for emerging networks to exceed 15 hours of prime time programming per week, which, in turn, limits competition to the established networks and ensures that stations not affiliated with those networks will receive less programming choices than otherwise. Fox Affiliates believe that Fox should be allowed to obtain full parity with the three major networks without being subject to finsyn restrictions. They note that Fox has fostered the goals of finsyn by increasing demand for original programming and making UHF and independent stations more competitive with the network affiliates.[135] Moreover, Fox argues that its continued growth is essential to establishing the type of competition that will eliminate the need to regulate the three established networks.

102. Independent Stations acknowledge that the 15-hour programming cap creates an incentive for Fox to limit its prime time schedule to avoid the finsyn restrictions. Nonetheless, they believe there are sound policy grounds for the 15-hour cap. They argue that a network entity, such as Fox, which offers a substantial amount of prime time programming on a regular basis to stations serving most of the U.S., has the ability to affect the off-network and first-run markets in a manner that the finsyn rules are designed to prevent.[136] INTV suggests that if the rules impede the emergence of new networks, the proper solution is to offer additional leeway in the definition rather than to repeal the finsyn rules. INTV also contends it is unlikely that there will be a fifth network any time soon because a new network needs an adequate base of independent station

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134 Schurz, 982 F.2d at 1053.

135 Fox Comments at 1-5, 12-16; Fox Affiliates Comments at 10-14.

136 Independent Stations Comments at 21-22.

affiliates.[137]

103. ABC argues there is no principled reason to exempt Fox from syndication rules if the rules truly have a sound basis. ABC also points out that while there may be no prospect of a fifth network emerging soon (i.e., due to limited allotment space), finsyn rules could, nonetheless, inhibit the development of hybrid networks, serving both cable and network affiliates.[138]

104. Decision. After carefully reviewing the record in this proceeding and considering the concerns expressed by the Court regarding the adverse effects of the 15-hour prime time programming threshold, we are retaining our "television network" definition but exempting "emerging networks" from application of the finsyn rules regardless of the number of hours of prime time programming that such entities provide. As Fox and Fox Affiliates point out, the 15-hour threshold has the adverse effect of discouraging emerging networks such as Fox from programming to capacity, thereby depriving independent stations of access to quality first-run programming essential to their survival. We are persuaded by Fox's claim that it will not provide programming in excess of any limit that would require divestiture of its television production and syndication businesses. As the Court indicates, Fox's assertion is corroborated by the fact that Fox reduced its hours of programming to avoid classification as a network when we adopted the 1991 network definition.[139] Such unintended consequences are contrary to the objectives of the finsyn rules.

105. The emergence of Fox has greatly enhanced source diversity by offering viewers alternative, network-quality prime time programming. It has also bolstered outlet diversity by providing a solid financial base to Fox's affiliates, many of which were formerly marginal independent UHF stations. In view of our decision to provide for the expiration of the remaining rules two years after the district court in California modifies the relevant restrictions in the network consent decrees (discussed infra at Section F), we believe that general application of the finsyn rules to emerging networks is not warranted. Subjecting Fox to finsyn restrictions once its prime time offerings pass 15 hours, only to have the restrictions expire after the provisions in the network consent decrees are lifted, would serve no useful purpose and would likely only discourage Fox from expanding its prime time offerings to capacity. Such a result would be counterproductive and would negatively affect independent stations and network competition in the interim. Moreover, it does not appear that any other entities are sufficiently close to the threshold to qualify as networks before the rules expire.

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137 INTV Reply Comments at 12, 18-19. AFTRA contends that finsyn effectively limits Fox to 15 hours of programming and that a fifth network will not emerge due the burdens of the finsyn rules. AFTRA Reply Comments at 2.

138 ABC Reply Comments at 18-19.

139 See Schurz, 982 F.2d at 1053.

106. We recognize that in the 1991 R&O, we stated that "as an entity starts to provide more of a full prime time programming service, it would have a growing potential to affect significantly the off-network and first-run syndication marketplace" and should therefore "eventually encounter the same regulatory treatment as established networks."[140] That reasoning applied to the 1991 rules -- a regime which was substantially more restrictive in the financial interest area and which did not provide for a date certain at which the remaining restrictions would expire. With the significantly modified approach of this Second R&O, however, we have more appropriately balanced our interest in enhancing network competition with the objective of creating a level playing field among industry competitors. Under this approach, a more coherent scheme of regulation will be achieved by (1) application of reporting conditions to emerging networks, (2) elimination of the financial interest restrictions on the other networks, (3) a review of marketplace conditions once the consent decree restrictions are removed from the networks and (4) the ultimate expiration of the remaining rules. We believe that this framework better serves our objectives of enhancing competition and diversity and lends stability to the programming arrangements of new competitors such as Fox. Moreover, by subjecting emerging networks to the network reporting requirements, discussed below, the Commission will be able adequately to monitor the behavior of such networks to ensure that they do not abuse their finsyn exemption.

107. Although "emerging networks" are exempt under the modified finsyn rules, such networks that provide 16 hours or more of prime time programming per week to interconnected affiliates will be required to comply with the network reporting requirements described in Section F, infra. We believe that this approach will enable the Commission to monitor the programming practices of emerging networks to ensure that they do not abuse their exempt status by engaging in the types of anti-competitive conduct that the finsyn rules were designed to prevent. Moreover, the reporting requirements are unlikely to discourage emerging networks from expanding their prime time program offerings. To facilitate this transition, we have decided to allow emerging networks an additional hour of prime time programming before they must comply with the reporting requirements.

108. In sum, adoption of an "emerging networks" exemption adequately addresses Fox's arguments and the concerns raised by the Court regarding the adverse affects of the 15-hour network programming threshold. Our modified approach continues to distinguish emerging networks from traditional networks without deterring the growth and expansion of emerging networks. Moreover, by exempting emerging networks from the finsyn rules, regardless of the number of hours of prime time programming they provide, we have remedied the Court's concern that application of the finsyn rules to Fox effectively "limit[s] competition with the major networks and thus

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140 R&O, 6 FCC Rcd at 3150.

entrench[s] the market power that [are] the rules' principal rationale."[141] In addition, the exemption ensures that Fox affiliates will continue to obtain network quality prime time programming. Our previously stated concerns regarding the ability of emerging networks to affect the off-network and first-run syndication market are outweighed by our desire to encourage the growth and development of such networks to their full capacity. Moreover, by subjecting emerging networks to the network reporting requirements, the Commission will be able adequately to monitor the conduct of emerging networks as their scope and programming practices approach those of ABC, NBC and CBS. We believe that observing the behavior of emerging networks under such circumstances may provide us with substantial insight into the business practices of major networks in an environment in which no rules exist.

E. Reporting Requirements

109. As stated in the previous sections of this Second R&O, we are retaining a set of reporting requirements tailored to facilitate our review of the effects that our actions here will have on network behavior. Although based on the 1991 reporting rules,[142] the following requirements reflect the changes we have adopted today:

(a) Networks must certify compliance with the Commission's remaining finsyn rules.

(b) A network must list all network prime time entertainment programs, whether aired on its own network or another network, and all first-run syndicated programs, in which it holds a financial interest or syndication right. To this end, the network should identify the name of the program, the type of program (i.e., network or first-run), the nature of the interest or right held in the program, the dates the program (if a network program) began and ended its network run, and the date the program (if a first-run syndicated program) first appeared in syndication. Where a network has acquired an interest or right in a program presented to the public before June 5, 1993 (the effective date of the main body of the rules adopted today), the network shall

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141 Schurz, 982 F.2d at 1053.

142 The 1991 rules required the networks to maintain semi-annual reports in their owned and operated stations' public files that (1) certified compliance with the Commission's Rules and (2) provided the following: (a) a record of all in-house productions that aired on any network's prime time entertainment schedule; (b) the domestic syndication record of its in-house programs that aired on any network prime time schedule; and (3) a record of all prime time entertainment programs in which the network held a financial interest or syndication right. Upon Commission request, networks were also required to make available for review any program contracts. The reports were to be placed in the public file before the first regular business day of September and March of each year. See 47 C.F.R. § 73.661.

identify the party that initiated negotiations that led to network acquisition of such interest or right.

(c) For the programs described under (b), above, a network must also identify the independent syndicator holding the active syndication rights, the date on which the independent syndicator obtained such rights, and the network's owned and operated and affiliated stations that have obtained the program for exhibition from the independent syndicator.[143]

(d) For any network that actively syndicates prime time entertainment programming or any first-run programs,[144] the network must list the

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143 In the MO&O, we expressed some concern that we might undermine the independence of a syndicator if we required networks to identify all stations purchasing programming in which the network had an interest. See MO&O, 7 FCC Rcd at 386. Given the changes that we have made to the finsyn framework today, however, we now believe that the need for gathering information about independent syndicator sales to a network's affiliates outweighs any danger that such information gathering may pose to the independence of the syndicator. Unlike the 1991 framework, the rules adopted today provide only for a two-year period during which the networks will be able to exercise their new -- but not unconstrained -- freedom in the program production and distribution markets. During this period, we will monitor whether any network abuses occur, but to do so requires that we gather information about sales practices involving network interests. Moreover, elimination of the 1991 rules' affiliate favoritism behavioral restriction and the current ban on active domestic syndication greatly increase the need to develop a clear picture of the networks' response to their new-found ability to acquire back-end rights to programs that they must still syndicate through an independent syndicator. The most effective method for obtaining this information, however, is to require the networks to identify the affiliates to whom an independent syndicator supplies programming in which the network has an interest. We also note that the other information we have asked networks to supply about the independent syndicator carries no risk to the independence of the syndicator. Thus, where the network has sold the active syndication rights to an independent syndicator, the network will already know the identity of the syndicator and the date the active syndication rights were acquired. In cases where the network has not held the active syndication rights, the network will be entitled to such knowledge, by virtue of the network's financial interests or passive syndication rights in the program. Finally, any information about a network's owned and operated stations' programming practices is already within the knowledge of the network.

144 Networks that may actively syndicate such programming are: (a) emerging networks, and (b) the established networks with respect to (i) off-network programming distributed in foreign markets, (ii) first-run programming distributed in foreign markets if solely produced by the network, and (iii) other first-run programming distributed solely in foreign markets, regardless of the production arrangement.

sales to broadcast stations of any such programming it actively syndicates.

110. As was the case with the 1991 rules, reports containing the required information must be placed in the network's owned and operated stations' public files before the first regular business day of September and March of each year. In addition, to facilitate the monitoring and review process described below, we have decided to require the networks to submit these reports to the Commission as well, under the same semi-annual deadlines that apply to placement of the reports in the public file. Networks will be expected to update any information in the reports on these semi-annual dates.[145] Moreover, networks will continue to be required, upon Commission request, to make available for review program contracts relevant to these rules.

111. We conclude that these reporting requirements will help the Commission monitor the efficacy of the rule changes adopted herein and oversee the networks' conduct in the program acquisition and syndication markets. In this connection, the data collected pursuant to these requirements should prove useful in conducting the scheduled review of the new finsyn regime, described below.

F. Revised Review Period and Expiration of Residual Restrictions

112. Our decision today reflects our predictive judgment that phased removal of constraints on network participation in the purchase and distribution of programming is likely to best serve the public interest by generating more competition in the marketplace for television programming. At the same time, we are aware of the possible damage that an immediate elimination of all the rules might cause -- including significant upheaval and disruption in the industry and potentially harmful competitive abuses not unlike those that led to the original imposition of the rules. Thus, we have identified and are removing the portion of the finsyn rules whose elimination appears least likely to cause such harm and most likely to create positive effects -- i.e., the restraints on network acquisition of financial interests and passive syndication rights, and all restraints in connection with programs distributed in foreign markets. We intend to monitor network behavior carefully under this new regime and to test our predictive judgment. We are, however, somewhat less certain about removing constraints on active network syndication of off-network programs and on substantial network involvement in the first-run market. In these areas, there is a closer nexus to our traditional interest in diversity that could

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145 For example, information identifying an independent syndicator, or the date a network program has ended its network run, may not be available at the time the network first reports its financial interest or syndication right in a program. The updated information must be submitted to the Commission and placed in the public files by the first semi-annual deadline following the change in circumstances.

be adversely affected if our predictions prove inaccurate.[146]

113. Accordingly, we have decided to retain these restrictions until two years after the district court in the consent decree litigation issues a decision modifying the relevant restrictions of the consent decrees. Eighteen months after a ruling on these consent decree restrictions, we will launch an inquiry to provide an opportunity for comment to those who believe that retention of restrictions is warranted. The burden of proof will be on these proponents of retention. Unless the Commission issues an order to the contrary, all finsyn restrictions will expire six months after the review is launched.

114. Remand Comments and Replies. Commenters opposing an automatic expiration of the finsyn rules included producer, independent station and public interest groups, while commenters favoring complete elimination of finsyn restraints were generally silent, implicitly relying on their position that all such restraints should be lifted now. The former group of commenters argued that the Commission should base its decision to eliminate the restrictions on a contemporaneous record rather than on a prediction as to what might occur in the future.[147] The Coalition was the only party to discuss modifying the four-year review period specified in the R&O for reevaluating the 1991 Rules, and it stated that it would not object to extending the date for future review from the current requirement of 1995 to 1997.[148]

115. Decision. For the reasons that we have stated, we are prepared today to establish a timetable and procedure that will lead to elimination of all remaining finsyn rules.[149] We recognize, however, that the finsyn regulatory scheme has been in place for over two decades, during which industry participants have come to rely on the structure imposed by that scheme. We are particularly concerned in this context with the health of the independent stations, who provide a vital alternative voice to viewers. Fresh off-network and first-run syndicated product is essential to the

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146 Moreover, as we discussed in connection with first-run syndicated programming, retaining constraints in the first-run area balances our removal of constraints on network acquisition of back-end rights.

147 Coalition Comments at 26-27; Independent Stations Comments at 28; INTV Comments at 8-9; MAP Comments at 3-5; PPDC Comments at 12.

148 Coalition Comments at 26-27.

149 The predictive aspect of our decision here focuses on network behavior once the finsyn restrictions are lifted, not on future market developments while the networks remain under these restrictions. Although current market conditions justify substantial removal of the finsyn constraints, we believe that the prudent course before complete removal is to see how the networks and the marketplace react to partial lifting of the restrictions. While we anticipate that abuses will not occur, that determination is of necessity predictive.

health of those stations. Immediate elimination of all of the rules could be disruptive and have unintended and unforseen negative effects. We are predicting today that, if the networks are permitted to exercise more rights in programming production and distribution through modification of the consent decrees and the modification of our rules, they will do so without engaging in anti-competitive activities or threatening diversity in the program production and distribution arena. It is, nevertheless, appropriate that we proceed somewhat cautiously to ensure, insofar as possible, that the modifications of the restrictions can be smoothly integrated into industry practices without harming the public interest. Our task is to balance competing concerns: relaxing the restrictions on the networks while at the same time maintaining vigilance for effects that are contrary to the public interest. We find that we can achieve a reasonable balance by creating a time frame for eliminating the remaining rules, safeguarded first by the district court's review of the modification requests pending in that forum, and second by our staggering the removal of the restrictions.

116. The Commission's finsyn rules, of course, are not the only safeguards present in the marketplace for network television programming. ABC, CBS and NBC are subject to the restrictions of consent decrees entered in the United States District Court for the Central District of California (the "Consent Decree Court") in 1978 (as to NBC) and 1980 (as to ABC and CBS).[150] These restrictions, inter alia, prohibit the networks from acquiring financial interests or proprietary (distribution) rights in non-network uses of television programs by others, or from engaging in the domestic syndication business. The consent decrees also prohibit the networks from conditioning or tying the purchase of the network right to a program upon the supplier's grant of any other right or interest to the network. These consent decree provisions, which are not limited in duration,[151] essentially replicate the Commission's 1970 finsyn rules and act as an additional bar on network participation in the financial interest and syndication areas of the television programming business. On May 8, 1992, in response to our 1991 R&O, the three networks filed motions with the Consent Decree Court proposing that the decrees be modified to delete the provisions prohibiting ABC, CBS and NBC from acquiring financial interests in, or engaging in the syndication of, network television programming. Their motion was supported by the Justice Department in a filing consenting to the modifications.[152] The Consent Decree Court has received public comment on the proposed modifications and is now considering the consensual motions of the networks and the Justice Department to remove the court-

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150 See supra note 3.

151 The Justice Department no longer enters into consent decrees containing terms of unlimited duration but instead imposes a 10-year term on most decree provisions. See Memorandum of the United States in Response to Motion of Defendant National Broadcasting Co., Inc. to Modify the Final Judgment (C.D. Cal. Civil No. 74-CIV-3601, May 7, 1992) ("DOJ Memorandum") at 5 n.11.

152 Id.

imposed finsyn rule analogues.

117. Because these consent decrees duplicate the Commission's 1970 finsyn rules, we will not have an opportunity to measure the competitive impact of removing our own restrictions unless and until the consent decrees are modified. Thus, attempting to establish a unilateral, Commission-imposed timeline for review and possible expiration of our own rules is in most respects an academic exercise. We believe, therefore, that a more practical and workable transition can be achieved if we link our final review of these rules, and their expiration, to the actions of the Consent Decree Court. Accordingly, we provide for the following review and expiration procedures with respect to the remaining Commission restrictions. Upon the entry by the Consent Decree Court of an order modifying the consent decrees to delete the financial interest and syndication restrictions, a two-year period will begin in which we will monitor the business practices of the networks in the programming marketplace. We believe that a two-year period is adequate to ensure that granting the networks these new opportunities does not cause unintended negative consequences; this period will enable us to assess the networks' activities over at least one complete cycle of the television program procurement and distribution processes, as well as an adequate period to observe market trends in this dynamic, rapidly changing industry. Although the three major networks will not have been participants in active domestic syndication, we nonetheless believe that their activities during this period can provide sufficient assurance that will confirm our conclusions that restrictions on their syndicating programming are no longer necessary.

118. As a further safeguard, we will launch a final review eighteen months after the Consent Decree Court modifies the consent decrees as described above to provide an opportunity for opponents of finsyn repeal to demonstrate that retention of restrictions is warranted. Based on the evidence available to us today, we are prepared to presume that complete removal of all remaining restrictions will be appropriate, and we are therefore placing the burden of proof on those that urge retaining finsyn restrictions. If proponents of retaining the rules fail to demonstrate to the Commission that the rules should be left in place, or if the Commission fails to act within six months after the final review begins, then the rules shall automatically expire. We will examine a variety of factors, however, to confirm our predictions on how the networks will respond to their new opportunities under the rules adopted today. Factors we may consider include the following:

- o The extent to which a network-owned program is syndicated primarily to that network's affiliates.

- o Patterns that reveal the extent of delay of network programs (in which the networks had financial interests or syndication rights) into the syndication market.

- o The percentage of network programming in which a network has obtained a financial interest or syndication right.

o The relative change in the number of independent producers creating and selling television shows to the networks.

o Each network's share of the first-run syndicated programming domestic market.

o Concentration of ownership in the program production industry.

o Audience shares of first-run syndicated programming carried by non-network affiliated stations during prime time.

o The overall business practices of emerging networks, such as Fox, in the network television and syndication business.

o Network negotiating patterns, particularly the manner in which networks obtain financial interests and syndication rights and the extent to which successful negotiations over back-end rights influence network buying decisions.

o Network syndication practices, to the extent they are permitted.

o The relationship and business arrangements between networks and third-party syndicators of off-network programming.

o Mergers or acquisitions involving networks, studios, cable systems and other program providers, after the effective date of these rules.

o The growth of additional networks, including the development of Fox and its position vis-a-vis the major three networks.

o The growth in the number and types of alternative outlets for sale of programming (e.g., the development of the Direct Broadcast Satellite service; cable penetration; wireless cable development).

119. In sum, the timeline for review and expiration of the remaining restrictions is as follows:

-- The Consent Decree Court enters an order modifying the relevant consent decrees' restrictions on financial interest and syndication activity.

-- No later than eighteen months after the order is entered, the Commission initiates a final review of the remaining rules. The burden of proof in the review shall be on the proponents of retaining the restrictions.

-- Two years after the order is entered (i.e., six months after the review begins), absent an affirmative Commission action to the

contrary, the rules expire.[153]

IV. Procedural Matters, Effective Date and Ordering Clauses

120. Except for the reporting requirements, the rules the Commission adopts today shall take effect on June 5, 1993, which is the day on which the 1991 rules expire by Court order. See supra note 7. Although that period is less than 30 days from publication in the Federal Register, we find good cause to shorten the effectiveness period because (1) the new rules remove restrictions on the networks, and (2) this will ensure that no gap exists between the present rules and the new rules. The reporting requirements will take effect upon approval by the Office of Management and Budget.

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153 This framework presumes that the consent decrees will be modified, a view predicated on the antitrust principles underlying the consensual modification of consent decrees to which the government is a party. Such consensual modifications are evaluated under a public interest standard that is satisfied if the settlement or modification to which the government consents is "within the zone of settlements consonant with the public interest today." United States v. Western Electric Co., 900 F.2d 283, 307 (D.C. Cir. 1990), cert. denied, 111 S.Ct. 283 (1990); United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir. 1981), cert. denied, 454 U.S. 1083 (1981). Accordingly, the fact that the modifications sought have the consent of the government gives the parties' positions considerably more weight, absent a showing of bad faith or malfeasance on the part of the government, than motions made unilaterally by an antitrust defendant. See United States v. Western Electric Co., 900 F.2d at 308. We therefore believe it to be reasonably likely that the relevant provisions of the consent decrees will be modified.

By providing that modification of the consent decrees will trigger our own final review of the finsyn restrictions, we do not mean to suggest that the public interest examination required in the context of an antitrust proceeding is identical to or would by itself satisfy the Commission's own public interest analysis. See United States v. Radio Corporation of America, 358 U.S. 334, 351 (1959). As the Justice Department noted earlier in this proceeding, the Commission's public interest mandate extends beyond antitrust principles and requires that we account for diversity in programs and program sources. See Further Comments of DOJ at 4, 5 (filed Dec. 21, 1990). In a proceeding to examine the consensual modification of consent decree provisions, the relevant judicial inquiry concerns the proposed modifications' impact on the public interest in competition. Id. at 308; see also DOJ Memorandum at 12-13. However, inasmuch as competition is also one of the Commission's central concerns in carrying out our public interest mandate, a decision by the Consent Decree Court to modify the networks' decrees provides some additional support for our using the Court's actions as the "trip wire" for our own final review and ultimate expiration of these restrictions.

121. Pursuant to the Regulatory Flexibility Act of 1980, the Commission has set forth a final analysis, which appears in Appendix B, in response to the Initial Regulatory Flexibility Analysis of the Second Further Notice.

122. Accordingly, **IT IS ORDERED** that pursuant to the authority contained in Sections 4(i), 301, 303(b), (f), (g), (i), and (j), 307(d), 308(b), 309(a), 310, 312, 313, and 314 of the Communications Act of 1934, as amended, Part 73 of the Commission's Rules **IS AMENDED** as set forth in the attached Appendix C.

123. **IT IS FURTHER ORDERED** that the amendments to 47 C.F.R. Part 73 adopted in this Second Report and Order will be effective on June 5, 1993, except for the amendments to Section 73.661, which shall be effective upon approval by the Office of Management and Budget.

124. **IT IS FURTHER ORDERED** that this proceeding **IS TERMINATED**.

125. Further information on this proceeding may be obtained by contacting David E. Horowitz or Kathleen O'Brien Ham, Mass Media Bureau at (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Initial Comments

1. Action for Children's Television and Henry Geller (ACT)
2. The Association of Independent Television Stations, Inc. (INTV)
3. Capital Cities/ABC, Inc.
4. CBS, Inc.
5. The CBS Affiliates
6. Chris-Craft/United Television Station Group, Tribune Broadcasting Company, and Channel 50 TV Corporation (Independent Stations)
7. Coalition to Preserve the Financial Interest and Syndication Rule (Coalition)
8. Fox Broadcasting Company
9. FBC Television Affiliates Association
10. King World Productions, Inc.
11. Media Access Project, Office of Communication of the United Church of Christ, Foundation for Independent Video and Filmmakers, Arizona Consumers Council, Association of Community Organizations for Reform Now and Congress Watch (MAP)
12. NBC, Inc.
13. Program Producers and Distributors Committee (PPDC)
14. Quincy Broadcasting Company, Inc.

Reply Comments[1]

1. INTV
2. Capital Cities/ABC, Inc.
3. CBS, Inc.
4. Independent Stations
5. The Coalition
6. Fox Broadcasting Company
7. King World Productions, Inc.
8. McKinnon Broadcasting Company
9. NBC, Inc.
10. PPDC
11. The Writers Guild of America, West, Inc.

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[1] The American Federation of Television and Radio Artists (AFTRA) filed its reply comments on February 17, 1993. Pursuant to Section 1.41 of the Commission's Rules, we will consider these late-filed pleadings as informal comments in this proceeding. We also note that we have received several ex parte comments in this proceeding. Those ex parte comments have been included in the record of this Docket.

APPENDIX B

Final Regulatory Flexibility Analysis

Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

I. Need for and Purpose of This Action:

Following a decision of the United States Court of Appeal for the Seventh Circuit in Schurz Communications v. FCC, 982 F.2d 1043 (7th Cir. 1991), the Commission amends its 1991 financial interest and syndication rules as specified in the Second Report and Order. These changes are made in accordance with the Court's remand, the record in this proceeding, and the ongoing changes in the video marketplace since 1991.

II. Summary of Issues Raised By Public Comments In Response to the Initial Regulatory Flexibility Analysis:

There were no comments submitted in response to the Initial Regulatory Flexibility Analysis.

III. Significant Alternatives Considered and Rejected:

The Commission has analyzed the Court's opinion, the comments submitted in response to the Second Further Notice of Proposed Rulemaking, and the overall record in this proceeding and has decided that amendment of its 1991 financial interest and syndication rules is warranted. The Commission considered retention of the existing rules, or some modification thereof, and has settled on the amended regulations detailed in the Second Report and Order as constituting the best approach for furthering diversity and competition in the broadcast television program production and syndication marketplace.

APPENDIX C

Part 73 of Title 47 of the Code of Federal Regulations is amended to read as follows:

Part 73 Radio Broadcast Services

1. The authority citation for Part 73 continues to read as follows:

AUTHORITY: 47 U.S.C. Sections 154, 303

2. Section 73.659 is revised to read as follows:

§ 73.659 Television network financial interests and syndication rights in first-run programs.

No television network, other than an "emerging network" defined in Section 73.662(g), may hold or acquire continuing financial interests or syndication rights in any first-run non-network program or series distributed in the United States unless the network has solely produced that program or series.

3. Section 73.660 is amended by removing paragraphs (a) and (b), redesignating paragraph (c) as paragraph (b), revising the introductory paragraph of redesignated paragraph (b), and adding new paragraph (a) to read as follows:

§ 73.660 Television network participation in program syndication.

(a) No television network, other than an "emerging network" as defined in Section 73.662(g), may actively syndicate any prime time entertainment or first-run non-network program to television stations within the United States. Any programs for which a network holds syndication rights shall be syndicated domestically through an independent syndicator.

(b) Where a television network, other than an "emerging network" as defined in Section 73.662(g), has syndication rights in prime time entertainment programming, such programming shall be made available for non-network broadcast exhibition within the United States no later than the earlier of:

* * * * *

4. Section 73.661 is revised to read as follows:

§ 73.661 Network television program ownership and syndication reports.

(a) A television network shall maintain reports identifying all network prime time entertainment programs, whether aired on its own or another network, and all first-run non-network programs, in which the network holds or acquires financial interests or syndication rights. The network shall identify the name of the program, the type of program (network or first-run), the nature of the interest or right held in the program, the dates the program (if a network program) began and ended its network run, and the date the program (if a first-run program) first appeared in syndication. Where a network has acquired an interest or right in a program presented to the public before June 5, 1993, the network shall identify the party that initiated negotiations that led to network acquisition of such interest or right. Any contract or agreement creating or conveying a financial interest or syndication right shall be made available to the Commission upon request.

(b) For any television network that actively syndicates any prime time entertainment program or any first-run non-network program, the network shall maintain reports that list the sales to broadcast stations of any such programming it actively syndicates. Any contract or agreement creating or conveying the right to engage actively in syndication sales shall be made available to the Commission upon request.

(c) For the programs described under paragraph (a), of this section, a television network shall maintain reports that identify the independent syndicator who holds the active syndication rights, the date on which the independent syndicator obtained such rights, and the network's owned and operated and affiliated stations that have obtained the program for exhibition from the independent syndicator. Any contract or agreement entered into between a network and an independent syndicator creating or conveying the right to engage in syndication shall be made available to the Commission upon request.

(d) Each television network shall certify in writing that it is in compliance with Sections 73.659 - 73.661.

(e) An "emerging network," as defined in Section 73.662(g), is exempt from compliance with the requirements of paragraphs (a) through (d) of this section until it provides to interconnected affiliates, on a regular basis, 16 hours of prime time programming per week (exclusive of live coverage of bona fide news events of national importance).

(f) The records maintained pursuant to paragraphs (a), (b), (c), and (d) of this section shall be filed with the Commission and placed in the public file of each station owned and operated by the network semi-annually before the first regular business day of September and March of each year. Such records shall be maintained in the public file until the remaining syndication rules expire.

5. Section 73.662 is amended by removing paragraphs (b), (c), (e), and (j), redesignating paragraphs (d), (f), (g), (h), and (i) as paragraphs (b)

through (f), and adding new paragraph (g) to read as follows:

§ 73.662 Definitions for television network financial interest, syndication and prime time access rules.

* * * * *

(g) an "emerging network" is an entity not meeting the definition of a "television network," as set forth in paragraph (f) of this section, on June 5, 1993, but which subsequently meets this definition.

6. Section 73.3526 is amended by revising paragraph (a)(11) as follows:

§ 73.3526 Local public inspection file of commercial stations.

(a) * * *

(11) Every television broadcast station owned or controlled by a television network shall maintain the records required by Section 73.661. These records shall be maintained in the file until the remaining syndication rules expire.

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Separate Statement
of
Chairman James H. Quello

Second Report and Order, In the Matter of Evaluation of the Syndication and Financial Interest Rules, MM Docket No. 90-162.

This decision is a testament to a spirit of compromise in which reasonable people can disagree, or, perhaps more importantly, in which people can disagree reasonably.

The financial interest and syndication ("finsyn") rules have generated more controversy than any other single issue during my tenure at the Commission. It is no secret that the issue has divided this agency over the past three years. Indeed, the three Commissioners voting on this *Second Report and Order* approached the matter from sharply divergent perspectives.

Despite these differences, we were able to work together to reach a decision that, for the most part, is acceptable to all. Each office contributed creative ideas to the final outcome. And while it was not possible for every Commissioner to support fully every aspect of the *Second Report and Order*, we at least avoided the discord that cluttered previous proceedings. I believe the process by which we reached the decision represents the essence of reasoned decisionmaking.

I am writing separately to thank my colleagues for their good-natured cooperation in this proceeding, but also to underscore my own unease with certain aspects of the ruling. My reading of the record suggests that networks should be allowed actively to syndicate both off-network and first run programming. However, I was persuaded to accept continuing syndication limits on the understanding that they would expire at a specified time, and those seeking to reimpose such restrictions would face a heavy burden of proof.

Accordingly, I am voting in favor of the overall result, but with respect to the continuing restrictions on network involvement in the first run market and active syndication, I can only concur.

Just as the burden of proof will be on the proponents of rules when we conduct our final review following modification of the consent decrees, the Commission has an obligation to provide both logical and evidentiary support for those rules we retain today. But a searching review of the record really supports only two principal attributes of the syndication restrictions: their brevity and their presumptive expiration.

At the outset, I should emphasize that I fully support the public interest goals underlying the syndication rule. Specifically, I believe that the growth of independent stations has contributed significantly to the viewing options available free over-the-air to the American public.[1] But apart from rhetoric, I find nothing in the record to suggest that the finsyn rules have contributed significantly to the growth of independent stations.[2] Ironically, the strongest evidence before us shows overwhelmingly that UHF stations have been strengthened not because of the finsyn rules, but in spite of them — through the growth of the Fox Broadcasting Company.[3]

Since networks have not been active in syndication for more than two decades, the Commission should articulate exactly what the threat would be to allowing such entry now. The *Second Report and Order* assumes that networks could affect the supply of programs available to independent stations. Taking the anticompetitive motive for granted, this would be a serious concern only if networks syndicate a significant portion of the available programming, *and* they manage to predict which shows will be most popular, *and* they persuade other profit participants in the program to go along in an anticompetitive effort *and* they prevent other syndicators in the market from supplying attractive alternatives.[4] But this series of assumptions is implausible.

Networks currently are uninvolved in the syndication market, and, as the rules' proponents acknowledge, it would take years for them to develop a significant presence.[5] Even if they did so, it is doubtful that networks could control the market. As I noted in dissent to the *Reconsideration Order* in this docket, "the networks would have to produce hits in sufficient quantities to make inroads into a market that now

belongs exclusively to the studios and other syndicators. Since even the majority recognizes that 'it is virtually impossible to tell at the outset whether a proposed program will become a "hit,"' *Reconsideration Order* at ¶ 36, it is difficult to envision a strategy by which the networks could dominate the market." *Evaluation of the Syndication and Financial Interest Rules*, 7 FCC Rcd. 345, 396 (1991) (Commissioner Quello dissenting), *rev'd and remanded sub nom. Schurz Communications v. FCC*, 982 F.2d 1043 (7th Cir. 1992), *rehearing denied*, (February 16, 1993).

Even if the networks could gain the power to affect the syndication market, it is not at all certain that they would have the incentive to behave anticompetitively. For example, networks have no reason to warehouse popular programs in that syndication tends to improve the ratings of the continuing show. Examples of this phenomenon include *Cheers*, *Rosanne*, *Murphy Brown* and *Full House*.[6] To whatever extent bad motives could lead a network to overlook its own economic interests, other profit participants ensure that programs will be syndicated promptly and to the highest bidder.[7]

In the end, it is an abundance of caution — rather than record support — that gives the Commission a reason to retain syndication limits. Even commenters supporting the rule admitted that "there is no hard evidence concerning the precise extent to which ABC, CBS or NBC would harm independent stations by engaging in affiliate favoritism or warehousing practices or use their control over their O&Os to handicap the launch of independently produced first-run programs."[8]

Given such a sparse record, it might have benefitted the Commission's analysis to focus on what actually *is* happening in the syndication market, rather than to speculate on what the networks *might* do. Such an examination would have revealed that the syndication industry is concentrated and would benefit from additional competition.

In 1991-92, for example, the top ten syndication firms had 82.3 percent of the market. Six of the top ten firms were major studios with a 49.2 percent share. The top ten first run syndicators have an 85.3 percent market share. Kingworld and Paramount together control 40 percent of the syndication viewing audience. Add Buena Vista and Warner Brothers, and the total exceeds 50 percent. Six years ago, sixteen syndicators had shows in the top 20. But in 1992, only eight syndicators had first run product in the top twenty.[9]

Considering facts such as these, the Commission reasonably could have concluded that immediate network entry into syndication would increase both competition and diversity. Indeed, these facts made it very difficult for me to agree that it was reasonable to continue imposing syndication restrictions. After all, in 1991 the Commission found that it was safe to allow networks to actively syndicate in-house productions up to 40 percent of their prime time schedules. Nevertheless, the new syndication rules are more restrictive than the prior regulations, even though more direct competition to network prime time programming has emerged during the past two years. *See Second Report and Order* ¶¶ 43-51.

The remaining rules are predicated on the assumption that the syndication market — and particularly the first run market — are fragile flowers that would wilt at the first sign of network predation. But apart from the understandable lobbying posture of interested parties, there is little in the record to support this view. Perhaps a more balanced assessment can be gleaned from trade press reports, where one Warner Brothers syndication executive noted: "Prime time is the final frontier. . . . We own kids [programming] and we have pretty much taken over daytime with talk shows. We dominate late night, early fringe and prime access. Now we're looking at prime time."[10] I wonder whether such market participants need our protection.[11]

In addition, I question whether some of the restrictions we impose on network involvement in the first run market actually will promote diversity. For example, by allowing networks to invest in first run programming only when it is "solely produced," we eliminate the profit participants who represent the best check on affiliate favoritism. Additionally, by giving the networks the right to actively syndicate first run programs that are sold only in foreign markets, we encourage investment in shows the American public will never see. I am unsure how either provision serves our policy goals.

I would have preferred to eliminate the syndication ban for both off-network and first run programming, and, pending final expiration of the regulations, to rely on behavioral safeguards to prevent the possibility of warehousing or affiliate favoritism. But while I believe this would have been the most reasonable course of action, it is not the only reasonable policy choice.

As noted above, I can accept — albeit reluctantly — continuing syndication restrictions so long as it is understood that they will expire in a limited time. And while I am troubled by the idea of "taking back" the right to actively syndicate in-house productions, it is important to acknowledge that this right has not yet been exercised because of the network consent decrees. As we enter the final phase of the rules before they expire, I believe it is helpful to have simpler regulations that lack the "Rube Goldberg complexity" of the 1991 scheme. This I think we have achieved.

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[1]The expansion of independent television has created more local viewing choices, including more news and public affairs programming. This is the type of diversity that implicates the public interest, not — as some commenters suggest — the fact that off-network programs can be seen again and again on independent stations. *E.g.*, Independent Stations' Comments at 8. Indeed, trying to find an important public interest value in viewers' enhanced access to "reruns" contradicts the premise of our syndicated exclusivity rules. 47 CFR § 76.151 (1993).

[2]*See, e.g.*, INTV Comments at 12-18; Independent Stations' Comments at 7. *But see* CBS Reply at 18, quoting INTV Initial Comments filed in June 1990 ("an assertion that the rules caused the growth of independent television may be an exaggeration"). It is noteworthy that UHF station growth does not correlate with the finsyn rules — most of the expansion did not begin until 1979. Growth of UHF primarily was due to cable television, development of advertising markets and satellite delivery of syndicated programming. *See* CBS Reply at 18-19; ABC Reply at 18. *See also* NBC Comments at 16.

[3]Eighty-nine percent of Fox affiliates are UHF stations. FBC Affiliates Comments at 1. The emergence of Fox has strengthened the ability of UHF stations to compete and to produce news and other original programming. *Id.* at 6-9, 11. In the past 2 years, Fox has assisted 19 affiliates in creating local news services, and 17 more have requested assistance. Fox Comments at 7. Additionally, the growth of Fox has strengthened non-Fox independents by allowing more programming to be available to the other stations (including sports) and by freeing up local advertising markets. *Id.* at 7-8. *See Second Report and Order* ¶ 104.

[4]As one commenter put it, "[t]he effect on the competitive position of independent stations would be particularly severe if *each* of the networks controlled a substantial amount of syndicated programs, and *all* of the networks gave preferential treatment to their affiliates and their owned and operated stations." Independent Stations' Reply at 6-7 (emphasis in original).

[5]*See* Independent Stations' Reply at 8 ("no network owns a significant quantity of syndication rights today and that it would take the networks a few years to build a large inventory of off-network syndication rights if the syndication rule were repealed"). *See also* CBS Reply at 12 (Because of Fox and the growth of first run, there is a glut of programming in the syndication market. There will be 20 off-network half hours available for the 1994-95 season.).

[6]CBS Reply at 15.

[7]*See* Fox Reply at 4-5.

[8]Independent Stations' Comments at 11. *See also* Kingworld Comments at 4 (Diversity probably would not be harmed by network syndication of off-network shows. Networks might be more experimental in programming decisions if they could share in back-end rights.). The Independent Stations assert, however, that the Fox network, which has not been constrained by the rules, has favored its O&O stations in syndication practices. Independent Stations' Comments at 11-14. Those charges are without substance. *See* Fox Reply at 3-8.

[9]NBC Comments at 25; CBS Comments at 10.

[10]J. Mandese, *Power Surge*, ADVERTISING AGE, March 8, 1993 at S-1. Such comments are reminiscent of the remarks of Roger King, Chairman of King World, who reportedly said of his company, "[w]e ruled the 80s . . . and now we're locked in halfway through the '90s." Mahoney, *'This Company is Just Really Beginning,'* ELECTRONIC MEDIA, June 24, 1991 at 30.

[11] While some commenters point to the ownership by networks of major market stations as a reason for the rule, *e.g.*, Independent Stations' Comments at 9, this factor does not distinguish the networks from other major broadcast group owners, some of whom are active in first run syndication. CBS Reply at 17; Fox Reply at 13. Nor does the fact that networks have affiliate relationships operate as a drag on the first run market. It certainly has not hindered the launch of new first run prime time series, even when this has led to preemptions of network shows. *See, e.g.*, ABC Reply at 17; Fox Reply at 16.

SEPARATE STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

RE: Financial Interest and Syndication Rules; Second Report and Order.

I have been reviewing the record evidence in this proceeding since our initial Notice of Proposed Rulemaking in March 1990. In that action, a unanimous Commission terminated the prior proceeding which lead to the 1983 Tentative Decision in BC Docket No. 82-345, and commenced a new docket. Since that time, I have reviewed and rereviewed arguments made on the record in response to the 5 options proposed in our March 1990 notice. As of our initial decision in April 1991, the Commission had received numerous comments, proposals, counterproposals, and counters to the counterproposals. In response to various petitions for reconsideration, we revisited our April 1991 Report and Order in October 1991. At that time, the Commission adopted a Memorandum Opinion and Order affirming its April 1991 decision, and clarifying the technical application of certain rules. After review and remand by the United States Court of Appeals for the Seventh Circuit in Schurz Communications v. Federal Communications Commission, 982 F.2d 1043 (7th Cir. 1992), the Commission issued a Second Further Notice of Proposed Rulemaking in December 1992, in which we sought comment on issues raised by the Court. Now, I have reviewed the record evidence once again. My review of this record indicates one thing. The media programming market is undergoing constant change in response to changing technologies and economic market factors. From 1990 to 1993, I have observed ongoing changes in patterns of program supply and distribution. These changing market factors have lead me to constantly reassess my position in this docket. Since these changes continue to happen at a rapid pace, I believe the time has come for the Commission to tailor remaining restrictions in this area to its primary jurisdictional concern: the preservation of broadcast outlet diversity in the marketplace. I believe such a public interest objective is addressed by encouraging competition between healthy, existing networks, healthy independent broadcast stations, and new emerging broadcast networks. Ultimately, I believe these rules must continually be tested by the competitive realities of the marketplace, and modified as necessary where competition can alleviate concerns regarding potential network misconduct or abuses.

At this time, I believe that the networks, through their owned and operated stations and their long-term relationship with a nationwide web of affiliates, retain a unique ability to influence program distribution practices with respect to independent stations and emerging networks. Thus, I support our decision today to retain a more simplified, but direct form of

restrictions on network syndication activities. Given the ongoing changes in the marketplace, these rules directly address what I believe should be the Commission's only remaining concern in this area-- the preservation of broadcast outlet diversity through access to diverse syndicated program sources, be that off-network syndicated programs or first-run syndicated programs. Further, as indicated by our decision today, I believe these remaining rules should be subject to ongoing scrutiny, with the burden for retaining the rules on those who argue that they remain necessary. Thus, given the contentious litigation and delay experienced in adopting our 1991 rules, I support an effort to reassess the need for these remaining restrictions in several years. Such a review will be disciplined by our determination today that the rules should expire absent strong justifications, based on marketplace evidence, that remaining restrictions continue to be justified.

With respect to my support for modifications to our 1991 rules governing the network acquisition of financial interests, the 40% schedule cap, and the network definition, I base my decision on the following principles: (1) The Commission must acknowledge ongoing changes in the market for program supply and acquisition. My assessment of the market is that cable continues to be a growing source of bidding for original TV movies and off-network syndicated product. There also is evidence that cable networks are becoming involved in the program series market. I believe this trend will continue with the launch of DBS in 1994. The growth of Fox as an emerging network also must be factored into an assessment of the program acquisition marketplace. Given these developments, I do not believe that the Commission should continue to find that its primary concern is to protect program producers from network bids for their programming. Nor do I believe that program source diversity based on network scheduling should continue to be a primary concern of the FCC. Competition from emerging networks and cable program networks addresses my regulatory concerns in this area. Qualitative disputes about how much a certain entity will pay for certain types of programming should not be the primary concern of the Commission. Thus, I support the elimination of financial interest restrictions on network prime-time program acquisitions; (2) The 40% schedule cap complicated the manner in which networks could acquire syndication rights, while restricting the potential abuses from network syndication activity that could favor affiliates over independent stations. In view of my ongoing concerns for the preservation of outlet diversity, I support removal of the schedule cap in exchange for a clear ban on all active domestic syndication. Despite this ban on active syndication, the networks will be permitted to participate in the ownership stream of revenues for programs syndicated by an independent syndicator; and (3) The Commission has an ongoing interest in promoting emerging networks. Thus, I support our decision to relax remaining syndication restrictions for emerging networks. In the long run, the further growth of additional emerging broadcast networks may eliminate the need for

any remaining restrictions on the existing broadcast networks.

The future program marketplace is likely to evolve into combinations of network, cable, direct broadcast satellite (DBS) and first-run program networks. Competition in all aspects of the marketplace for program sources to independent television stations and emerging networks will be a significant factor in my future assessment of the need for any remaining restrictions. Further, the implication of additional ownership concentration between network and cable entities, or networks and additional broadcast outlets also must be considered in this regard.

STATEMENT
OF COMMISSIONER ERVIN S. DUGGAN

Dissenting in Part

In the Matter of Evaluation of the Syndication and Financial Interest Rules (MM Docket No. 90-162)

Although this action is couched as a partial retention of the finsyn rules, in reality it marks their death. If anything is clear, it is that an undertow, a gravitational force, has for years been pulling these rules down. The latest addition to that force is judicial. The Seventh Circuit last year, in Schurz v. FCC, subjected the 1991 rules to the closest possible scrutiny and demanded that we provide a better explanation. Another element of that gravitational force is economic: The three major networks are being buffeted by extraordinary competitive forces; we are told that the ground beneath them is eroding as they struggle to compete for programming. The third and final element of that gravitational pull on the finsyn rules is, frankly, political: Such events as the purchase of studios by foreign interests have had their effect.

All of these forces notwithstanding, I was eager to engage the Schurz court in reasoned, earnest debate about our 1991 decision. I do not oppose the networks' phased reentry into lines of business foreclosed by former absolute prohibitions or by other limits that need changing. I have supported relaxation of the network-cable cross-ownership restriction, for example. I have voted to examine our television multiple ownership rules and continue to be open to moderate changes in those restrictions. Finally, I supported relaxing the finsyn rules in 1991.

The fact that I was willing to debate the merits of the Schurz opinion does not mean that I would defend every detail of what we did 1991. Some of the rules may have warranted modification under the Court's stern eye. But I was, and am, ready to defend the core principle of our 1991 order: the principle that the only responsible, prudent, reasonable way to relax the finsyn restrictions is through phased deregulation with reality checks along the way. That is a principle I fought for in our original decision; I was prepared to defend it again by accepting the Court's challenge to explain more fully the

rationale for our action in 1991. While the presence of the consent decree restrictions might have made our reality checks somewhat difficult under the 1991 rules, I believe that we could have gained sufficient insight into the networks' business practices to evaluate the impact of additional deregulation. I believe that such an approach was the proper and preferable way to proceed in the overheated atmosphere of finsyn.

I was willing to debate the Schurz court for a second reason: The Court's decision made no attempt to sort out the apocalyptic views repeatedly pressed by the various parties upon the Commission and, ultimately, upon the Seventh Circuit. The balance of the Schurz opinion subscribes only to the views of one side: those who sought to strike the rules down, immediately and in their entirety. The court essentially made its case in all-or-nothing terms: light against darkness, good against evil, virtue against sin. The Court, in my view, has indulged in judicial Manicheanism, and if it is mistaken, the consequences could be grave. The Commission, in my judgment, should have been willing to respond vigorously in defense of a more careful approach. But this was not to be.

Concerning the first part of today's order, then, which abruptly junks the financial interest rule, I must dissent because it seems to me to violate the principle of phased deregulation.

In an earnest effort to reach out to Chairman Quello, however, and in recognition that he has done some reaching of his own, I am agreeing to the second aspect of our order, concerning the syndication rules. This decision steers closer to the principle of reality-based deregulation. The syndication side of the video market will remain off limits to the networks until we can gain experience by observing their behavior on the financial interest side. By resisting the immediate blowup of the syndication rules, we have at least succeeded in preserving some form of reality test for the time being.

Another feature of today's action grants emerging networks a dispensation from the rules. This seems to me entirely consistent with the principle of phased deregulation, and with our desire to encourage fledgling networks, so I join my colleagues in supporting it. It has never been my desire to throw a roadblock in front of a fourth network, or a fifth or sixth. To the extent that our decision represents encouragement for new entrants into the network business, I support this action.

Let me sound now a final note about the finsyn process, concerning the proposed final review of the rules. I have earnestly and sometimes furiously resisted the automatic sunset

of Commission rules--- what we might call regulation by robot. In my judgment, it is irresponsible, except in rare cases, for us to terminate rules automatically, without giving a future Commission any opportunity to apply human intelligence and judgment to conditions that we cannot predict. To do so would seem to me the very essence of arbitrariness and caprice. The review process we have created here, fortunately, avoids that snare. It requires that the Commission perform the reality checks that are important to me--- and do so in an environment designed to call forth arguments out of reality, rather than ideology or theory.

When that review begins, the burden of defending the tattered remains of finsyn will fall entirely on the rules' proponents. The fact that the Commission contemplates terminating the rules unless the Commission affirmatively acts to save them is nothing more than a further concession to reality. This feature of the rules calls to mind Dr. Johnson's remark about the prospect of being hanged: It will "concentrate the minds" of all parties, and focus the final debate.

I mark the Commission's decision not with rancor, only with regret. I have supported freeing the nation's great broadcast networks from regulation in other areas, albeit gradually. I believe the nation needs broadcast networks strong enough to remain the anchor tenants in the multichannel malls of the future. I will continue to support changes in our rules to make that possible.

# # #

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 93-178

In the Matter of	)	
	)	
Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-265
	)	
Development of Competition and Diversity in Video Programming Distribution and Carriage	)	

FIRST REPORT AND ORDER

Adopted: April 1, 1993; Released: April 30, 1993

By the Commission: Commissioner Marshall not participating; Commissioner Barrett issuing a separate statement.

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I. INTRODUCTION

1. This Report and Order adopts rules to implement Section 19 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), which adds a new Section 628 prohibiting unfair or discriminatory practices in the sale of satellite cable and satellite broadcast programming to the Communications Act of 1934.[1] Section 628 is intended to increase competition and diversity in the multichannel video programming market, as well as to foster the development of competition to traditional cable systems, by prescribing regulations that govern the access by competing multichannel systems to cable programming services.

2. Section 628(a) states that the purpose of this provision "is to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market, to increase the availability of satellite cable programming and satellite broadcast programming to persons in rural and other areas not currently able to receive such programming, and to spur the development of communications technologies." Section 628(b) states that

> it shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a

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[1] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. (1992). This Report and Order will not address carriage agreement issues raised by Section 12 of the Act on which the Commission also sought comment in this proceeding. Although the carriage agreement and program access provisions involve similar unfair or anticompetitive practices in selling programming, Section 12 carries a longer statutory deadline for implementation that will allow us to issue separate implementing rules at a later date.

satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.

3. Section 628(c) instructs the Commission to adopt regulations to specify particular conduct that is prohibited by subsection (b). Specifically, the regulations are to:

(1) establish safeguards to prevent undue influence by cable operators upon actions by affiliated program vendors related to the sale of programming to unaffiliated distributors;
(2) prohibit price discrimination by vertically integrated satellite cable programming vendors and satellite broadcast programming vendors; and
(3) prohibit exclusive contracts between a cable operator and a vertically integrated programming vendor in areas that are not served by a cable operator and any such exclusive arrangements in areas served by cable that are not found in the public interest by the Commission.

The statute provides parties aggrieved by conduct alleged to violate the program access provisions the right to commence an adjudicatory proceeding before the Commission.

4. The Commission's Notice of Proposed Rulemaking[2] sought comment on various issues pertaining to the intended objectives and scope of the statutory program access provisions, as well as whether the regulations adopted pursuant to Section 628(c) should only implicate those "unfair," "deceptive," or "discriminatory" practices that have the purpose or effect of significantly hindering the access of distributors to programming that are referenced in the more general provisions of Section 628(b). As a related issue, the Commission asked for comment on the geographic market that would be relevant to determining whether a practice causes anticompetitive harm.

5. The Notice also sought comment on matters pertaining to particular practices prohibited by the 1992 Cable Act. Concerning "undue influence" by cable operators upon affiliated programming vendors' sales practices, we asked commenters to address the activities that should constitute "undue influence," and how we could distinguish such practices from other activities that could occur during the normal course of legitimate negotiation.

6. With respect to discrimination among distributors by programming vendors, we asked commenters to identify "discriminatory" pricing practices in comparison to legitimate business strategies for distributing video programming. The Notice observed that the statute permits programming vendors to impose certain requirements to account for different characteristics among

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[2] See Notice of Proposed Rulemaking in MM Docket No. 92-265 (Notice), 8 FCC Rcd 194 (1992).

multichannel video programming distributors (MVPDs),[3] including cost and volume-related factors, and inquired whether other legitimate economic factors may exist to explain price differences that are consistent with the statute. We also sought comment on whether other laws that address price discrimination issues could help guide our analysis when evaluating price differentials.

7. Regarding exclusive program contracts, we sought comment on (1) an appropriate determination of whether an area is served by a cable operator, (2) how to identify the specific arrangements that the restrictions on exclusivity should prohibit, and (3) the factors necessary to determine whether a particular arrangement serves the public interest.

8. Finally, we proposed for comment a streamlined complaint procedure that would expeditiously resolve Section 628 complaints while affording all parties due process. The proposed procedures would require complainants to establish a prima facie case of a statutory violation with respect to programming access. We sought comment on the factors that should constitute a prima facie showing.

II. SUMMARY OF DECISION

9. In enacting the program access provisions of the 1992 Cable Act, Congress expressed its concern that potential competitors to incumbent cable operators often face unfair hurdles when attempting to gain access to the programming they need in order to provide a viable and competitive multichannel alternative to the American public. The comments submitted in this proceeding from cable's emerging competitors reflect this fundamental concern. Indeed, various distributors have described numerous situations in which their ability to secure programming has been impaired, either by refusals to sell cable programming by certain vendors, or by discriminatory terms and conditions imposed upon the acquisition of various programming services. Accordingly, in order to fully implement the mandate of the 1992 Cable Act, we are today adopting regulations that proscribe the specific conduct detailed in Section 628. In addition, we are promulgating complaint procedures carefully designed to provide effective relief by placing the least necessary evidentiary burdens on those seeking relief under our program access rules and ensuring a speedy resolution of their complaints.

10. With respect to the entities covered by Section 628, we will follow the plain language of the statute by applying the general prohibition in Section 628(b) against "unfair methods of competition" and "unfair or deceptive acts or practices" to all cable operators, all satellite broadcast programming vendors

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[3] For the purposes of the regulations to implement Section 628, we will define a "multichannel video programming distributor" as an entity engaged in the business of making available for purchase, by subscribers or customers, multiple channels of video programming. Such entities include, but are not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, a television receive-only satellite program distributor, and a satellite master antenna television system operator, as well as buying groups or agents of all such entities.

and vertically integrated satellite cable programmers. Thus, a cable operator or satellite broadcast programmer may become subject to this provision of the 1992 Cable Act even if they are not vertically integrated. By contrast, the more specific proscriptions in Section 628(c) regarding activities that constitute undue influence and discrimination apply to vertically integrated cable operators, vertically integrated satellite cable programmers and all satellite broadcast programming vendors. The restrictions in Section 628(c) on exclusive contracts apply to vertically integrated programmers (cable and broadcast) and their contracts with cable operators. Thus, with respect to the specific actions encompassed by Section 628(c), vertical integration is more often an essential element of a complaint.

11. As a general matter, in order to file a complaint regarding discrimination, exclusive contracts, or undue influence under Section 628(c), vertical integration need not exist in the specific market at issue. Rather, the complainant need show only that the relevant programmer or cable operator is vertically integrated in any market. We believe that this approach is most consistent with congressional intent and best addresses Congress' apparent concern with industry-wide influences that can occur even in the absence of a vertical relationship in the complainant's specific market. Moreover, to ensure that all entities with potential incentives to engage in anticompetitive conduct are covered by our rules, we are adopting a fairly strict attribution standard for assessing vertical integration. Specifically, attributable interests will include all voting or nonvoting equity interests of five (5) percent or more. The single majority shareholder exemption and limited partnership insulation criteria used in our broadcast attribution rules will not apply.

12. We will not require complainants alleging violations of the specific prohibitions in Section 628(c) -- regarding discrimination, exclusive contracts, or undue influence -- to make a threshold showing that they have suffered harm as a result of the proscribed conduct. In this regard, we are persuaded that Congress has already determined that such violations result in harm. We do believe, however, that the plain language of the statute requires complainants filing under the general prohibitions in Section 628(b) against unspecified unfair practices to demonstrate that an alleged violation has the "purpose or effect" of hindering significantly or preventing the complainant from providing programming to subscribers or consumers. In these cases, a complaint will not go forward unless the complainant makes a threshold showing of harm.

13. When considering complaints regarding undue influence or discrimination, we will compare the programming arrangement of the complaining distributor against the programming arrangements enjoyed by its competitors. We believe that focusing on the programming terms received by competitors will best serve the underlying objective of Section 628 to remove unfair competitive obstacles and create a level playing field in the market for program distribution. We will define the geographic market for identifying "competing" distributors either locally, regionally or nationally, depending on how the affected distributor buys and delivers programming. Therefore, in order to identify "competing" distributors, we will require potential complainants to compare programming terms with respect to a distributor that has some overlap

in actual or proposed service areas.

14. With respect to Section 628(c)(2)(B)'s prohibition against price discrimination in the distribution of cable programming, we believe that Congress has given us ample guidance in the statute itself to determine whether a particular price differential is discriminatory. Accordingly, we will find price discrimination to have occurred if the difference in the price charged to competing distributors is not explained by the statute's permissible factors. In general terms, these factors involve (1) cost differences at the wholesale level in providing a program service to different distributors; (2) volume differences; (3) differences in creditworthiness, financial stability, or character; and (4) differences in the way the service is offered. The statute's prohibition against discrimination also encompasses non-price discrimination, which we believe could occur through "unreasonable refusals to sell" programming, including instances where a vendor refuses to initiate negotiations, or to offer particular terms, to an individual distributor, or to a class of distributors, when such programming or terms are offered to competing distributors.

15. When evaluating a discrimination complaint, we will initially focus on the difference in price paid by (or offered to) the complainant as compared to that paid by (or offered to) a competing distributor. The program vendor will then have to justify the difference using the statutory factors set forth in Section 628(c)(2)(B). As part of its showing that the price offered to the complainant is permitted by the statute, the programmer may submit either a rate card or other contracts it has signed with distributors whom it believes are similarly situated to the complainant. We will define "similarly-situated distributors", for these purposes, as those that operate in the same geographic area, have roughly the same number of subscribers, purchased a similar service, and use the same distribution technology as the distributor with whom the complainant competes and has compared itself. In all cases, the programmer will bear the burden to establish that the price differential is adequately explained by the statutory factors.

16. Regarding the prohibition against exclusive programming contracts set forth in Section 628(c)(2)(C), we conclude that exclusive arrangements between vertically integrated programmers and cable operators in areas not served by a cable operator are illegal *per se* and may not be justified under any circumstances. Moreover, exclusive contracts in areas served by cable (except those entered into prior to June 1, 1990) may not be enforced unless the Commission first determines that the contract serves the public interest. Because we are unable to find, on the record before us, that any particular class of exclusive contracts can be presumed to serve the public interest, these determinations will be made on a case-by-case basis using the five public interest factors set out in the statute.

17. In order to fulfill Congress' directive that Section 628 complaints be resolved expeditiously, we have developed a streamlined complaint process that will enable us to settle uncomplicated complaints quickly while still resolving complex cases in a timely manner. Our rules will encourage program vendors to provide relevant information to distributors before a complaint is filed with the Commission. In the event that a vendor declines to provide such

information, it will be sufficient for a distributor to submit a sworn complaint alleging, upon information and belief, that an impermissible price differential or exclusive arrangement exists, or that other prohibited conduct -- such as undue influence or an unreasonable refusal to sell -- has occurred. The programmer will have the opportunity to refute the charge. Complainants may then submit a reply, after which the Commission will review the pleadings and assess whether the complaint can be resolved on the written record or whether further investigation is required. If further action is necessary, the staff will have the discretion either to require the submission of further information or, where appropriate, allow discovery and/or designate the proceeding for a hearing before an Administrative Law Judge.

18. We have not adopted "safe harbors", penetration benchmarks or other mechanisms for screening complaints. Thus, for example, any differential in the price paid by one distributor as compared to its competitor may form the basis for a complaint. However, we will impose a higher burden on programmers to defend a price difference if it exceeds either 5 percent or 5 cents per subscriber, whichever is greater. Moreover, to ensure that we are not deluged with insignificant and unsubstantiated Section 628(c) allegations, we will adopt penalties for the filing of frivolous complaints.

19. Finally, given that Congress expressly grandfathered only a narrow class of contracts (those exclusive contracts in cabled areas entered into before June 1, 1990), the rules we adopt today will apply prospectively to existing contracts and to contracts executed after the effective date of the rules. To provide for a reasonable transition period, affected parties will have 120 days after the effective date of our rules in which to bring their agreements into compliance with our regulations.

20. Our decisions with respect to each of the foregoing issues are discussed in detail below.

III. COVERAGE OF THE STATUTORY PROGRAM ACCESS PROVISIONS

Background

21. The program access requirements of Section 628 have at their heart the objective of releasing programming to the existing or potential competitors of traditional cable systems so that the public may benefit from the development of competitive distributors. The 1992 Cable Act and its legislative history,[4] reflect congressional findings that horizontal concentration in the cable

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[4] House Committee on Energy and Commerce, H.R. Rep. No. 102-628 (House Report), 102d Cong., 2d Sess. (1992); Senate Committee on Commerce, Science, and Transportation, S. Rep. No. 102-92 (Senate Report), 102d Cong., 1st Sess. (1991); House Committee on Energy and Commerce, H.R. Rep. No. 102-862 (Conference Report), 102d Cong., 2d Sess. (1992), reprinted at Cong. Rec. H 8308 (Sept. 14, 1992).

television industry,[5] combined with extensive vertical integration (i.e., combined ownership of cable systems and suppliers of cable programming),[6] has created an imbalance of power, both between cable operators and program vendors and between incumbent cable operators and their multichannel competitors (i.e., other cable systems, home satellite dish (HSD) distributors,[7] direct broadcast satellite (DBS) providers, satellite master antenna television (SMATV) systems, wireless cable operators, etc.). This imbalance has limited the development of competition and restricted consumer choice. Congress further concluded that vertically integrated program suppliers have the incentive and ability to favor their affiliated cable operators over other multichannel programming distributors.[8] To address this problem, Congress chose program access provisions targeted toward cable satellite programming vendors in which cable

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[5] For example, the House Report observes that the largest multiple system operator (MSO), TCI, controls access to almost 25 percent of the nation's cable subscribers. House Report at 42.

[6] The legislative history lists 15 of the most popular cable programming services as being owned by cable operators. See Senate Report at 25. The House Report notes that, according to the National Cable Television Association, 39 of the 68 nationally delivered cable networks have some ownership affiliation with cable operators. See House Report at 41.

[7] With respect to the term "HSD distributors", many different types of entities in the HSD or television receive-only market purchase satellite programming services from vendors and sell that programming to consumers, while also providing various other services for HSD consumers. For the purposes of the program access regulations, we will use the term "HSD distributor" to refer to all such entities, including those entities that are commonly known as HSD dealers or third-party program packagers. See, e.g., UVI at Exhibit 4 (showing functions of retail sales agents for satellite programming, as well as the unique costs to vendors from delivering programming to the HSD market).

[8] 1992 Cable Act, Section 2(a)(5). See also Senate Report at 24; House Report at 41-45. In Report in MM Docket No. 89-600, 5 FCC Rcd 4962 (1990) (1990 Cable Report), the Commission similarly concluded that the cable television industry has become increasingly concentrated and vertically integrated, thus providing multiple system operators and vertically integrated cable operators the potential to pursue anticompetitive actions against programming services or competing multichannel providers. The 1990 Cable Report also found evidence that some cable operators have indeed used this potential anticompetitively. For example, alternative distributors presented evidence that some programming vendors refused to sell cable programming, and wireless cable and SMATV operators, HSD distributors, and second competitive cable systems described the discriminatory terms and conditions imposed on their acquisitions of various programming services. See 1990 Cable Report, 5 FCC Rcd 5006, 5008, and 5021. The NPRM also solicited detailed allegations or evidence regarding unfair or discriminatory practices in distributing cable programming to assist in prescribing regulations to govern conduct by programming vendors that may restrict access to programming. See Notice, 8 FCC Rcd 197.

operators have an "attributable" interest and toward satellite broadcast programming vendors regardless of vertical relationships. Thus, an initial issue to be addressed is what entities come within the statutory prescription and whether these entities are to be regulated in their program sales throughout the United States or only in those specific markets or situations where an actual vertical relationship exists.

22. Section 628(b), which sets forth the general prohibition required by the statute, proscribes "a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor" from engaging in unfair practices. Section 628(c) delineates the "minimum contents" of the program access regulations to be adopted by the Commission. The various provisions of Section 628(c) expressly apply to undue influence exerted by "a cable operator which has an attributable interest in a satellite cable programming vendor or a satellite broadcast programming vendor" (628(c)(2)(A)); discrimination by "a satellite cable programming vendor in which a cable operator has an attributable interest, or by a satellite broadcast programming vendor" (628(c)(2)(B)); exclusive contracts in areas not served by cable "that prevent a multichannel video programming distributor from obtaining . . . programming from any satellite cable programming vendor in which a cable operator has an attributable interest or any satellite broadcast programming vendor in which a cable operator has an attributable interest" (628(c)(2)(C)); and exclusive contracts in areas already served by cable between "a cable operator and a satellite cable programming vendor in which a cable operator has an attributable interest or a satellite broadcast programming vendor in which a cable operator has an attributable interest" (628(c)(2)(D)).

23. In the Notice, we tentatively concluded that Section 628 applies only to vertically integrated satellite cable programmers, and sought comment on whether we should similarly restrict application of this provision to vertically integrated satellite broadcast programmers. We further noted that the provisions of Section 628(c) that specifically apply to vertical relationships refer to one party having an "attributable interest" in the other. We thus sought comment on whether to define "attributable interest" with reference to the attribution rules generally applicable to the broadcasting industry, or whether to use a different standard.[9]

Comments

24. Vertical Integration. Commenters do not take issue with the Commission's conclusion regarding application of Section 628 to vertically integrated satellite cable programming vendors.[10] Commenters are divided, however, as to whether the statute applies only to satellite broadcast programming vendors that are vertically integrated. In addition, some commenters contend that Section 628 applies to all cable operators, regardless

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[9] Notice, 8 FCC Rcd at 196.

[10] A complete summary of comments regarding all aspects of this proceeding is included as Appendix C.

of whether they are vertically integrated. They argue that while 628(c) specifically refers to vertical relationships, the reference to "cable operators" in Section 628(b) is unambiguous in its omission of reference to vertical integration. Other commenters assert, however, that because the provisions of 628(c) apply only to vertically integrated cable operators, then the more general provisions of 628(b) apply only to vertically integrated cable operators.

25. In addition, some commenters argue that entities should only be subject to the provisions of Section 628 in those markets in which they are vertically integrated, as they would not have the incentive to engage in prohibited practices in markets where they are not vertically integrated. Other commenters disagree, arguing that size and market power can afford vertically integrated cable operators and programmers considerable ability to control programming access in areas where they are not actually vertically integrated.[11]

26. Attribution. Commenters are divided on the issue of determining an attribution standard for identifying "vertically integrated" entities, with most advocating use of something other than the broadcast model. Those commenters supporting use of the broadcast standard generally argue that the Commission has had considerable experience interpreting and implementing the broadcast attribution rules. They also note that the Commission has adopted a five percent attribution threshold with respect to its video dialtone rules and its cable/network cross-ownership rule. Other commenters support a benchmark lower than five percent, arguing that an interest of even less than five percent could be sufficiently significant to lead to the types of incentives about which Congress was concerned in adopting Section 628. On the other hand, commenters proposing an attribution benchmark higher than five percent contend that cable operator investment is necessary to the development of programming services, and several argue that the Commission should establish a standard of 50 percent or more to reflect actual control. In addition, a few commenters contend that an actual control or behavioral standard is preferable to a general numerical cutoff. Further, regardless of what attribution benchmark is adopted, a number of commenters propose exceptions for small cable operators or program services with low penetration. Commenters are also divided on whether the Section 628 attribution standard should incorporate other aspects of the broadcast rule, such as the single majority shareholder rule and the limited partnership insulation criteria.[12]

Discussion

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[11] WCA argues that in choosing not to limit Section 628 to those vendors that are vertically integrated in a specific market, Congress apparently rejected the Commission's proposal in the 1990 Cable Report to limit program access rights to those markets where the local cable operator has a cognizable interest in the programmer refusing to deal with alternative technologies. See WCA at 31-32.

[12] See 47 C.F.R. § 73.3555 (notes).

27. Our regulations regarding program access are designed to prohibit practices that are unfair and discriminatory, in a manner that is faithful to the policy of Congress to: (1) promote the availability to the public of a diversity of views and information through cable television and other distribution media; (2) rely on the marketplace, to the maximum extent feasible, to achieve greater availability of the relevant programming; (3) ensure that cable operators continue to expand, where economically justified, their capacity and the programs offered over their cable systems; and (4) ensure that cable television operators do not have undue market power vis-a-vis video programmers and consumers.[13] In order to best fulfill these objectives, we conclude that our program access regulations should apply to the specific entities enumerated in each provision of Section 628. Moreover, where vertically-integrated entities are involved, we believe that the statutory prohibitions should apply to such entities in all locations, regardless of vertical integration in the particular market.

28. Vertically integrated satellite cable programming vendors. Although other entities are implicated, a principal target of the restrictions contained in Section 628 is the conduct of vertically integrated satellite cable programming vendors. For this purpose, the term "satellite cable programming" means video programming which is transmitted via satellite, other than satellite broadcast programming, and which is primarily intended for the direct receipt by cable operators for their retransmission to cable subscribers.[14] The term "satellite cable programming vendor" means "a person engaged in the production, creation, or wholesale distribution for sale of satellite cable programming, but does not include a satellite broadcast programming vendor."[15]

29. We conclude that the general prohibition of Section 628(b) against unfair practices applies to vertically integrated satellite cable programming vendors, all satellite broadcast programming vendors and all cable operators in all locations, regardless of the existence of vertical integration in the

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[13] See 1992 Cable Act, Section 2(b)(1)-(3), and (5). We note that numerous alternative distributors allege that problems related to program access continue to exist, as they face higher programming rates than cable systems, and encounter restrictions in obtaining programming rights. See, e.g., CSS at 12, 15-16; WCA at 13, 16; CableAmerica at 3; National Cablesystem Associates at 7; NRTC at 18; APPA at 6; DirecTv at 28; People's Choice at 2; Cross Country Reply at 2; Liberty Cable Reply at 6; People's Cable Reply at 2. In response, programming vendors contend that these practices are often legitimately based, as price differentials are often based on necessary considerations, including those factors enumerated in Section 628(c)(2)(B)(i)-(iv), and they claim that the use of exclusive contracts has promoted the development of new and diverse programming services. See, e.g., A&E at 5; Discovery at 6; NCTA at 21; Time Warner at 28; TCI at 13; UVI at 23; Viacom at 19.

[14] See Section 628(i), which incorporates by reference the definition contained in existing Section 705 of the Communications Act.

[15] Section 628(i)(2).

particular market in question. This reading is consistent with the plain language of Section 628(b). While most of the provisions of Section 628(c) specifically apply only to vertically integrated entities, that subsection includes only the minimum required regulations to be promulgated by the Commission under 628(b), and is not intended to be entirely inclusive. Thus, we will reject the suggestion by some commenters that a vertical integration requirement for cable operators or satellite broadcast programmers should be read into Section 628(b).

30. Regarding the geographic considerations for vertical integration, we believe that the scope of the rules should not be limited to situations where a satellite cable programming vendor is vertically integrated with a distributor within a particular market. Instead, in order to file a complaint under Section 628, a complainant need only show that the programmer is vertically integrated as a general matter. Although some parties claim that programming vendors would not have the incentive to engage in the prohibited practices in markets where they are not vertically integrated, we believe that the legislative history demonstrates Congress' concern that vertically integrated vendors may control programming access in areas without a commonly owned distributor.[16]

31. Attribution. In assessing vertical integration, we will consider a cable operator to have an attributable interest in a programming vendor if the cable operator holds five percent or more of the stock of the programmer, whether voting or non-voting. We will not adopt the single majority shareholder aspect of the broadcast attribution rule. In addition, all officer and director positions and general partnership interests will be attributable, as will limited partnership interests of five percent or greater, regardless of insulation. We note that various attribution rules have been used by the Commission and by other regulatory agencies depending on the specific policy or rule in question, e.g., whether control, influence or some other aspect of the relationship is involved, and on an evaluation of the costs and risks associated with various levels of ownership or influence. The policy objective involved here, we believe, warrants a relatively inclusive attribution rule.

32. In fact, the rule we are adopting is consistent with the standard we use in the video dialtone context.[17] While some commenters advocated adoption of all aspects of the broadcast attribution rule, we believe that the intent of the video dialtone proceeding is more analogous to the intent of Congress in adopting Section 628, i.e., to curb incentives for influencing behavior of affiliates to the detriment of competitors. We stated in the video dialtone proceeding that "[i]n connection with broadcast/cable cross-ownership, we have determined that 5% ownership is an appropriate threshold for identifying the point at which ownership in a publicly traded entity may create the potential

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[16] See also 138 Cong. Rec. H6533-34 (daily ed. July 23, 1992) (Rep. Tauzin).

[17] See Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking in CC Docket No. 87-266, 7 FCC Rcd 5781 (1992) (Video Dialtone Order).

for influence or control."[18] We are concerned that a standard of more than five percent could allow cable operators to exert significant influence over their affiliated programmers without being subject to the statute.

33. We also disagree with some commenters' proposal that we adopt a behavioral test for assessing attribution. To provide certainty to the cable industry and the public, it is imperative that we develop a clear directive with respect to which entities will be deemed subject to the statute and our implementing rules. A behavioral test is necessarily ad hoc and therefore would not provide sufficient certainty.[19]

34. Non-vertically integrated satellite broadcast programming vendors. Vertical integration is not a requirement for applying the provisions of Section 628 to satellite broadcast programming vendors. For these purposes, the term "satellite broadcast programming vendor" means "a fixed service satellite carrier that provides service pursuant to [the compulsory licensing provision of section 119 of the Copyright Act], with respect to satellite broadcast programming."[20] The term "satellite broadcast programming," in this context, means "broadcast video programming when such programming is retransmitted by satellite and the entity retransmitting such programming is not the broadcaster or an entity performing such retransmission on behalf of and with the specific consent of the broadcaster."[21]

35. There appears to be little serious dispute as to the application of Section 628 to all satellite broadcast programming vendors. Although program distributors of this type are not subject to the conflicting incentives associated with vertical integration, they effectively sell a satellite relay

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[18] Video Dialtone Order, 7 FCC Rcd at 5819.

[19] We note that several commenters urged that we adopt an exemption from our attribution standards for a programming vendor whose aggregate subscriber base from its affiliated cable owners represents less than five percent (or some other small number) of its total program subscribership, arguing that such a vendor would have little incentive to engage in anticompetitive behavior because its affiliated customers purchase such a small percentage of the vendor's service. We decline to adopt such an exemption at this time because the record does not provide sufficient data to support a definitive point at which the incentives for such vendors to favor their affiliated customers differ from other vertically integrated programming vendors. We emphasize, however, that we could revisit this issue generally to the extent that parties are able to provide information regarding the incentives and past conduct of vendors with de minimis vertical interests. Similarly, to the extent that certain parties advocated a more flexible attribution standard for minority-owned cable programmers, we could revisit this attribution standard, to the extent that it is consistent with this section of the 1992 Cable Act, and would promote minority programming.

[20] Section 628(i)(4).

[21] Section 628(i)(3).

capacity rather than programming, since compensation for the programming involved is covered by the compulsory licensing provision of the Copyright Act. In this role, the rationales for differential pricing have been viewed somewhat differently and, based on the statutory coverage, apparently were not thought by Congress to be associated with vertical integration issues.

IV. UNFAIR METHODS OF COMPETITION AND DECEPTIVE PRACTICES

Background

36. Section 628(b) provides that:

> It shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.

37. The provisions of Section 628(c) that follow this general prohibition make it clear that certain types of exclusive contracting, undue influence among affiliates, and discriminatory sales practices are to be treated as unfair methods of competition or unfair or deceptive acts. In the Notice, we sought comment on whether Congress intended for the Commission to regulate any additional "unfair methods of competition or unfair or deceptive acts or practices" beyond those specifically referenced in subsection (c). In particular, we asked whether other practices that are precluded by the various antitrust laws -- such as refusals to deal or "tying" arrangements -- are encompassed within the terms of Section 628 and warrant Commission regulation. We also noted that the language of Section 628(b) itself addresses only practices that are (i) "unfair," "deceptive." or "discriminatory," and (ii) could significantly hinder multichannel video programming distributors from providing satellite programming to consumers. Moreover, because practices that a particular competitor might consider "unfair" or "discriminatory" may not significantly harm competition generally in distributing multichannel video programming, we questioned whether our analysis should consider harm to (i) consumers, measured by the amount or availability of programming to consumers in the market; (ii) other distributors in the market; or (iii) both consumers and distributors.

Comments

38. Commenters focus much of their discussion of Section 628(b) on the questions relating to harm in paragraph 10 of the Notice. Essentially, two points of view emerge. One view is that Section 628(b) broadly affords distributors an umbrella of protection from unfair conduct by programmers independent of the practices specifically prohibited in Section 628(c). The alternate view is that Section 628(b) favors programmers because it establishes the additional requirement that practices specifically prohibited under Section 628(c) must also violate Section 628(b) before they are

actionable.[22] With respect to filing complaints under Section 628(b), a number of commenters argue that an aggrieved distributor will have little information on which to base specific allegations of misconduct by a programmer and will be unable to provide detailed explanations of the facts tending to establish a violation absent opportunities for disclosure and discovery. Consequently, they assert, there should be a low threshold for making a prima facie case under Section 628(b).[23]

39. Regarding the burden of proof that a distributor must show in a Section 628(b) proceeding, CableAmerica contends that the complainant would have to make out a prima facie case that a programming vendor or cable operator was engaging in unfair competition or unfair or deceptive acts or practices. Where the complaint did not establish an anticompetitive purpose, CableAmerica asserts, the complainant would also have to establish a prima facie case that the practice prevented or significantly hindered the operator in providing programming to consumers.[24] The burden of proof would then shift to the respondent, which is in a better position to justify its conduct. UVI, however, argues in favor of more stringent requirements for a prima facie case. It contends that the Commission should require the complainant to provide specific real evidence of the complained actions and their effects to show that the program vendor's activities significantly hinder program distribution in the marketplace.[25]

Discussion

40. Neither the record of this proceeding nor the legislative history offer much insight into the types of practices that might constitute a violation of the statute with respect to the unspecified "unfair practices" prohibited by Section 628(b) beyond those more specifically referenced in Section 628(c). The objectives of the provision, however, are clearly to provide a mechanism for addressing those types of conduct, primarily associated with horizontal and vertical concentration within the cable and satellite cable programming field, that inhibit the development of multichannel video distribution competition.

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[22] Compare, e.g., CableAmerica at 14 (Section 628(b) broadly states congressional intent to bar practices by programming vendors that hinder the distribution of video programming, while the minimum contents of regulations to execute this goal are set forth in Section 628(c)), with NCTA at 7 (conduct that is determined to be unfair under Section 628(c) is not prohibited by Section 628(b) unless it also prevents or significantly hinders a distributor from providing programming). The question of harm with respect to those practices identified in Section 628(c) will be addressed separately below.

[23] See, e.g., WCA at 44.

[24] See CableAmerica at 41; see also Attorneys General at 14 (complainant must provide substantial evidence that the programming contract contains anticompetitive terms which have the "effect" of significantly hindering or preventing program availability).

[25] UVI at 37-39.

41. Thus, although the types of conduct more specifically referenced in the statute, i.e., exclusive contracting, undue influence among affiliates, and discriminatory sales practices, appear to be the primary areas of congressional concern, Section 628(b) is a clear repository of Commission jurisdiction to adopt additional rules or to take additional actions to accomplish the statutory objectives should additional types of conduct emerge as barriers to competition and obstacles to the broader distribution of satellite cable and broadcast video programming. In this regard, it is worth emphasizing that the language of Section 628(b) applies on its face to all cable operators. Elements of an offense under this provision would, however, include a demonstration that "the purpose or effect" of the conduct was to "hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers." In particular, the complainant must show that its ability to distribute programming to customers has been hampered in some fashion.[26] Parties filing complaints under this provision must use the procedures and statute of limitations established below for violations of Section 628(c)(2)(A) regarding undue or improper influence.

V. COMPETITIVE HARM OR HINDRANCE TO ACCESS AS AN ELEMENT OF RULES

Background

42. Before turning to the specific rules that we are adopting related to undue influence, discrimination, and exclusive contracting prohibited by Section 628(c), there is one issue of general applicability that warrants discussion at the outset. As noted in the preceding section, the general prohibition in Section 628(b) precludes conduct "the purpose or effect [of which] ... is to hinder significantly or prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers." We have thus concluded that parties bringing complaints under Section 628(b) must demonstrate how the allegedly unfair practice has hampered or prevented the distribution of programming. A related question asked in the Notice was whether a similar showing of "harm" must be made by complainants seeking relief under the more specific provisions of Section 628(c).[27]

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[26] We note that our analysis of the hindrance in the context of an alleged unfair practice will focus on whether the purpose or effect of the practice was to hinder or harm the complainant relative to its competitors.

[27] Notice at 196. Specifically, we asked commenters to identify (i) how a prohibited behavior hinders an MVPD from providing programming to subscribers or consumers; (ii) what evidence, if any, a complainant should be required to provide to show that the behavior has prevented it from carrying this or any other programming; and (iii) what evidence, if any, a complainant should be required to provide to show that the behavior threatened its viability because of the behavior's ultimate detrimental impact on consumers. Notice at n. 26 (emphasis added).

Comments

43. Some commenters contend that Section 628 only prohibits conduct that is both "unfair" and causes "harm" and that the rules adopted should have parallel requirements.[28] For example, these commenters argue that price discrimination by a programmer -- even though it is specified as a form of prohibited unfair practice under 628(c)(2)(B), and even though a price differential may be unjustified by the four enumerated exceptions -- should not constitute prohibited conduct in any particular case unless it significantly hinders the ability of a multichannel distributor to compete in providing programming to subscribers.[29] With respect to the degree of injury that a distributor must show, a number of commenters propose that the alleged unfair practice must have sufficiently hindered the distributor's ability to provide comparable programming so that its ability to compete is substantially impaired.[30] Finally, a number of commenters argue that since Congress contemplated that harm was caused primarily by vertically integrated entities, our rules should exempt any conduct, pricing mechanism, or other term or condition also imposed by non-vertically integrated entities, as well as any conduct by vertically integrated entities that is similar to that of non-vertically integrated entities.[31]

44. However, many commenters disagree with these interpretations and contend that there is no requirement in the statute that the Commission impose a threshold showing of harm to competition.[32] These commenters argue that requiring complainants to meet a threshold showing of harm in Section 628(c) -- where none was intended with respect to exclusive contracts and discrimination -- would undermine the goals Congress sought to achieve in implementing these provisions.[33] In their view, Section 628(b) broadly states congressional intent to prohibit practices by video programming vendors that hinder the distribution of video programming. To effectuate this goal, Congress set forth in Sections 628(c)(2)(A)-(D) specific practices that the Commission's regulations, at a minimum, must prohibit.[34] The commenters thus

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[28] See, e.g., Landmark at 5.

[29] See NCTA at 8.

[30] See, e.g., Discovery Reply at 5. Liberty Media further suggests that when a distributor obtains programming at more favorable prices than does a complainant, and this disparity is reflected in the favored distributor's lower retail prices to consumers, the complainant's ability to compete may be impaired. Liberty Media at 5-7.

[31] See, e.g., UVI at 16.

[32] See, e.g., DirecTv Reply at 2-3.

[33] See, e.g., CableAmerica at 14.

[34] See, e.g., DirecTv at 3-4.

argue that the proper reading of the statute provides that these practices, unless explicitly justified under the exceptions enumerated in subparagraphs (i)-(iv) of Section 628(c)(2)(B), violate the statute, and that no showing of harm is required.[35]

45. Several commenters note that the approach suggested in the Notice ignores the fact that the 1992 Cable Act allows for relief where conduct has the "purpose" of hindering or preventing an MVPD from providing programming, not just where it has that "effect."[36] Furthermore, a number of commenters criticize the cable industry's stance on harm, arguing that the statute does not require a complainant to prove that a prohibited practice has the effect of causing significant harm to competition (rather than solely to the complainant), or that the viability of its operation is threatened before the complainant may challenge a programmer's unfair practices.[37]

Discussion

46. In analyzing Section 628, it is clear that Congress intended for the Commission to regulate program access practices in a manner that would remedy (and thus eliminate) unfair and anticompetitive behavior. Accordingly, in the Notice, we sought to develop a complete record concerning the proper interpretation of the specific language Congress adopted. As noted above, the commenters discussed this issue at length, and the record shows that either of two interpretations could be supported by the express language of the statute. One interpretation of the words of Section 628 is that subsection (b) generally proscribes anticompetitive behavior that causes harm to MVPDs, and that subsection (c) defines specific conduct which the Commission's rules must prohibit and which Congress has already determined causes anticompetitive harm.[38] Alternatively, because subsection (c) requires the Commission to "prescribe regulations to specify particular conduct that is prohibited by subsection (b)," it is possible to read subsection (b)'s limitations as equally applicable to the behavior specified in subsection (c), such that the conduct specified in subsection (c) is only prohibited if it is shown to "hinder significantly or prevent" any MVPD from providing programming.[39]

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[35] See, e.g., NRTC at 13.

[36] See, e.g., CSS Reply at 3.

[37] See, e.g., CableAmerica at 16-17 (discussing para. 10 and n. 26 & 27 of the Notice).

[38] See, e.g., DirecTv Reply at 2-3, APPA at 13-18, CableAmerica at 14-18, CSS at 14.

[39] Some commenters argue that the complainant must show that it has been harmed; others contend that the complainant must show that harm to the video programming distribution market in general has occurred. See, e.g., E! at 5, Landmark at 5, Liberty Media at 7, NCTA at 7, Rainbow at 33, TCI at 5-10 and 31-32.

47. Looking to the legislative history, we note that the program access provisions were introduced as an amendment to the then pending House cable bill (H.R. 4850) by Representative Tauzin on July 23, 1992. On the same day, Representative Manton offered a competing amendment that would have prohibited a vertically integrated programming vendor from refusing to deal with a competing MVPD if such refusal to deal would "unreasonably restrain competition" (emphasis added).[40] The Manton amendment apparently contemplated that the Commission would make a determination of anticompetitive harm in each complaint case. The Manton amendment, therefore, specifically imposed on complainants a higher burden than the Tauzin amendment.[41] The Tauzin amendment, however, was ultimately adopted, with minor modifications, and is now Section 628 of the 1992 Cable Act.[42] Thus, the legislative history indicates that Congress did not intend to place a threshold burden on aggrieved MVPDs to show either specific or generalized harm to competition in those circumstances specifically prescribed in subsection (c). We conclude, therefore, that the language in subsection (b) was not intended to impose an additional burden or threshold showing on complainants with respect to the activities specified in subsection (c). Rather, we believe that if behavior meets the definitions of the activities proscribed in subsection (c), such practices are implicitly harmful.[43]

48. We note that this treatment of "harm" is common in FCC regulation. Our rules, for example, require licensees to keep their towers properly painted and lit; a violation occurs even if no one is damaged as a result of the licensee's failure to comply with our rules. We believe that Congress adopted a similar stance with respect to the specific practices proscribed by Section 628(c). In each case, a legislative determination was made that there was sufficient potential for harm that the specified unfair practices should be prohibited.

49. Therefore, we will not impose a threshold burden of demonstrating some form of anticompetitive harm on a complainant alleging a violation of Section 628(c). As noted in the preceding section, however, for those complainants alleging a violation of a general "unfair practice" prohibited by Section 628(b), consistent with the express statutory language we will require the complainant to demonstrate that the purpose or effect of the conduct complained of was to "hinder significantly or to prevent" an MVPD from providing

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[40] Congressional Record (July 23, 1992) at H6531 - H6543.

[41] See DirecTv at 4.

[42] See DirecTv Reply at 3, n.2 (discussing the modifications made to Rep. Tauzin's original proposal).

[43] In other words, if a price differential, or the magnitude of a particular price differential, between competing MVPDs cannot be justified under the statutory allowances, then discrimination has occurred, and a finding of harm is implicit. Similarly, if a vertically integrated programming vendor enters into an exclusive contract with a cable operator that governs an unserved area, or an exclusive contract governing a served area that does not meet the statutory public interest standard, a finding of harm is implicit.

programming to subscribers or customers.[44]

VI. LIMITATIONS ON EXCLUSIVE CONTRACTING

Background

50. As indicated above, the Commission is directed to prescribe program access regulations to specify particular conduct that is prohibited in three specific areas. The record in this proceeding reveals that there are two key areas of concern for cable competitors. First, a number of MVPDs assert that they have been unable to secure certain programming at all because programming vendors have exclusive contracts with cable operators, even in areas not currently served by cable. The first area we address thus relates to limitations of exclusive contracting. Second, even where MVPDs have been able to gain access to programming, they contend that they must pay unreasonably high prices for it. We accordingly will next turn to a discussion of the price discrimination prohibitions of Section 628(c)(2)(B). Finally, we address the prohibition against "undue influence" in Section 628(c)(2)(A), which received much less attention in the record.

51. Section 628(c)(2)(C) requires the Commission to develop rules that prohibit practices, understandings, arrangements, and activities, including exclusive contracts between cable operators and vertically integrated satellite cable and broadcast programming vendors, that prevent an MVPD from obtaining satellite cable or satellite broadcast programming for distribution to persons in areas not served by a cable operator as of the date of enactment of the 1992 Cable Act. Section 628(c)(2)(D) requires the Commission to prohibit such exclusive contracts in areas served by a cable operator unless the Commission determines that the exclusive contract is in the public interest pursuant to Section 628(c)(4). Section 628(h) exempts exclusive contracts, relating only to areas served by a cable operator, that were entered into on or before June 1, 1990 until such time, after October 5, 1992, as they are renewed or extended. Pursuant to Section 628(c)(5) the restrictions in Section 628(c)(2)(D) cease to be effective 10 years after enactment unless the Commission finds their continuation necessary "to preserve and protect competition and diversity in the distribution of video programming."[45]

52. In the Notice, we sought comment on a number of issues related to the implementation of these provisions. First, we questioned whether Section

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[44] Because we will not impose a threshold showing of harm on complainants filing under Section 628(c), we need not determine whether we should exclude entities with relatively small market shares from this standard. See Notice at 196. Moreover, because the record does not sufficiently support such an exemption, we will not establish such an exclusion for complainants with small market shares filing complaints under Section 628(b). Thus, any complainant alleging that specific behavior violates subsection (b) will be required to demonstrate anticompetitive harm as discussed above.

[45] See 1992 Cable Act §§ 628(c)(2)(C) and (D), § 628(c)(4), and § 628(h).

628(c)(2)(C) should be interpreted as a per se prohibition against exclusive contracts in areas unserved by a cable operator.[46] Next, we sought comment on the appropriate determination of whether an area is served by a cable operator, and how we should define "area."[47] We also questioned what other "practices, understandings, arrangements and activities . . . that prevent a multichannel video programming distributor from obtaining [satellite cable or satellite broadcast] programming" should come within the scope of our rules.[48] In particular, we asked commenters to address particular practices identified in our 1990 Cable Report to Congress, such as subdistribution arrangements.[49] In addition, we questioned whether the provisions of Section 628 impose any duty on a programmer to deal with non-affiliated programming distributors.[50]

53. Next we sought comment on whether any objective standards or benchmarks can be developed to assess the criteria set forth in Section 628(c)(4) to determine whether an exclusive contract in an area served by a cable operator is in the public interest, and whether any factors beyond those specified could be considered, such as specific benefits to exclusivity.[51] In particular, we asked commenters to identify specific instances where we could establish in advance that exclusive distribution arrangements were presumptively in the public interest, such as those related to the development or launch of a new programming service, so long as they were appropriately limited by rule (e.g., a two year limitation on the duration of an exclusive contract for a new program service).[52] Finally, noting that Section 628(c)(4)(D) refers to the effect of an exclusive contract on diversity in the "multichannel video programming market," we questioned whether we should apply a local and/or national market focus to this criterion, or whether some other market analysis was intended.[53]

Comments

54. General. Numerous commenters urge the Commission to recognize and confirm that exclusivity is a legitimate means of competition, in that it encourages the creation, promotion and distribution of new programming, thus

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[46] Notice at 201.

[47] Id.

[48] Id.

[49] Id.

[50] Id.

[51] Notice at 202.

[52] Id.

[53] Id.

serving the public interest.[54] Others contend that Congress views exclusive contracts in the cable area as a barrier to entry that harms competitors and should only be allowed in limited circumstances.[55] Most commenters agree that Section 628(c)(2)(C) constitutes a per se prohibition against exclusive contracts in areas not served by a cable operator.[56] Others contend that exclusive contracts in unserved areas are only unlawful if they have caused anticompetitive harm to the complainant, or that exclusive contracts should be permitted with any MPVD, including a cable operator, that is the first to provide video services to an unserved area.[57]

55. Several commenters state that the "area served" should be wherever a cable system actually passes a home or where a home can be connected to the cable system for the standard connect fee.[58] Others argue against a home-by-home analysis.[59] One commenter argues that an area is "served" if a home can be connected to either a wired or wireless system.[60] One commenter argues that Section 628(c)(2)(C) does impose on vertically integrated programming vendors a duty to deal with non-affiliated MVPDs, and one commenter argues that it does not.[61] Those commenters addressing what other practices should be prohibited under Section 628(c)(2)(C) basically agree that practices that have the same effect as exclusivity should be regulated, such as substantial rate differentials, time delay provisions, and restrictive subdistribution agreements.[62]

56. Numerous commenters argue that exclusivity should be determined to be presumptively in the public interest for launching and promoting new programming services, but offer varying time periods for an appropriate

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[54] See, e.g., Liberty Media at 47, NCTA at 48, TCI at 24-25.

[55] See, e.g., U.S. West at 8, TRAC at 3.

[56] See, e.g., NRTC at 28, NPCA at 25.

[57] See, e.g., Time Warner Reply at 38, NCTA at 40; Cablevision Reply at 5.

[58] See, e.g., DirecTv at 28, NRTC at 28.

[59] Time Warner Reply at 18.

[60] CCWCO at 4. The Attorneys General, however, argue that only the presence of wired cable operators is relevant. Attorneys General at 12.

[61] NYNEX at 13; Time Warner at 41-42.

[62] See, e.g., Discovery at 27, WJB at 16, CCWCO at 4. Time Warner argues that the Commission should not, at this time, exercise its authority to regulate practices other than exclusive contracts, and further argues that subdistribution agreements are an effective means of program distribution. Time Warner at 38-40. Other commenters propose specific limitations on the terms of subdistribution agreements that would prevent overly restrictive or anticompetitive effects. See, e.g., NPCA at 19-20.

permissible duration for such exclusivity.[63] Others respond that exclusivity is not necessary for new services because they need to be distributed as widely as possible.[64] In addition, some commenters argue that exclusivity should be presumptively permissible for introducing existing services to new markets.[65] Finally, many of the commenters offer specific examples of factors that should be considered and standards that should be applied to determine whether an exclusive contract in a served area is in the public interest.

57. Enforcement. With respect to procedural issues, numerous commenters argue that the statute requires the Commission to review and approve all exclusive contracts, and that the benefits derived from such an approach outweigh any regulatory burden.[66] Others argue that prior review is not required or permitted, and that such micro-management will cause extensive delays that will destroy what the Cable Act did not intend to eliminate.[67] Others suggest that the Commission rely on the complaint process to enforce the exclusivity provisions.[68]

58. With respect to the complaint process, some commenters assert that each factual allegation in a complaint should be supported by affidavits or relevant documents.[69] Numerous parties, however, discuss the unavailability of necessary information to potential complainants.[70] They argue that any requirement that a complainant support its allegations with detailed evidence is feasible only if the FCC establishes a mechanism outside the complaint process for obtaining information.[71] Others suggest some form of pre-complaint discovery.[72] Alternatively, commenters propose that the threshold for establishing a prima facie case must be sufficiently low to take into account the unavailability of supporting information to complainants.[73] For example, a complainant could be required simply to provide affidavits or other documentary

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[63] See, e.g., Liberty Media at 50; Continental at 21; Turner at 5-6.

[64] See, e.g., NSPN at 12; CableAmerica at 8.

[65] See, e.g., ARCC at 17; Cablevision Reply at 5; Liberty Media at 50.

[66] See, e.g., WCA at 43; APPA at 19; TRAC at 4; Bell South at 10.

[67] See, e.g., Time Warner Reply at 20; NCTA Reply at 41; Cablevision Reply at 5.

[68] See, e.g., Discovery at 28.

[69] See, e.g., Liberty Media at 59.

[70] See, e.g., DirecTv Reply at 11; CATA at 8; WJB at 17 and reply at 13.

[71] See, e.g., APPA at 27.

[72] See, e.g., Attorneys General at 13.

[73] See, e.g., WCA at 44.

evidence to support its belief that a prohibited exclusive contract exists, and the burden of proof would shift to the defendant to refute its existence or justify that exclusivity is in the public interest.[74]

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[74] See, e.g., CableAmerica at 40-41; CCWCO at 47.

Discussion

A. Exclusive Contracts in Areas Not Served by Cable

59. Section 628(c)(2)(C) is specific in mandating implementing regulations that prohibit "practices, understandings, arrangements, and activities, including exclusive contracts" between cable operators and vertically integrated satellite cable programming vendors or satellite broadcast programming vendors that prevent MVPDs from obtaining such programming for distribution "in areas not served by a cable operator as of the date of enactment of this section." The statute is unequivocal in this regard and thus the rules adopted will provide that such practices constitute a per se violation. As indicted in the Conference Report, an area "served" by a cable system is defined as "an area actually passed by a cable system and which can be connected for a standard connection fee."[75]

60. We note that some commenters questioned how the Commission would treat exclusivity provisions in contracts that cover both served and unserved areas. Given that the statute specifically exempts exclusive contracts in served areas that were entered into on or before June 1, 1990, but specifically excludes exclusive contracts in unserved areas from this "grandfathering," we believe that congressional intent is clear. Thus, if the contract predates June 1, 1990, exclusivity in the served areas is permitted, but is prohibited in unserved areas.[76]

61. As for "other practices, understandings, arrangements and activities" that should come within the scope of our rules, we agree with those commenters who believe that any behavior that is tantamount to exclusivity should be prohibited in unserved areas. Any other interpretation would undermine the goals Congress sought to achieve by prohibiting exclusivity itself. Thus, our rules will prohibit vertically integrated programmers from engaging in activities that result in de facto exclusivity, or from imposing requirements on MVPDs that prevent or restrict them from delivering their programming to any unserved area.

B. Exclusive Contracts in Areas Served by Cable

62. Section 628(c)(2)(D) treats exclusive contracts between vertically integrated programming vendors and cable operators in areas served by cable in a somewhat less restrictive manner. Contracts of this type are to be prohibited unless the Commission determines that "such contract is in the public interest." In making this judgment, the Commission is to consider each of the following factors with respect to the effect of such contract on the distribution of video programming in that area:

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[75] Conference Report at 93.

[76] We will utilize a case-by-case approach for determining appropriate remedies for situations in which a competing MVPD seeks to obtain programming for an area that includes portions of a served area in which an exclusive contract is grandfathered.

(A) the effect of such exclusive contract on the development of competition in local and national multichannel video programming distribution markets;
(B) the effect of such exclusive contract on competition from multichannel video programming distribution technologies other than cable;
(C) the effect of such exclusive contract on the attraction of capital investment in the production and distribution of new satellite cable programming;
(D) the effect of such exclusive contract on diversity of programming in the multichannel video programming distribution market; and
(E) the duration of the exclusive contract.

63. We note that exclusivity under this provision is not prohibited. As a general matter, the public interest in exclusivity in the sale of entertainment programming is widely recognized. Indeed, elsewhere in the 1992 Cable Act, in the context of the broadcast station-cable system relationship, specific steps have been taken to protect exclusive rights. In the unique situation presented here, however, it is clear that exclusivity is not favored. Congress has clearly placed a higher value on new competitive entry than on the continuation of exclusive distribution practices that impede this entry. In its 1990 Cable Report, the Commission itself articulated this balance as follows: "While we agree with the cable commenters that the Commission should and does generally support exclusivity rights, we believe that the public interest in developing competition to the local cable operator justifies temporary, limited and targeted intervention to ensure that alternative multichannel program providers have fair and equitable access to programming."[77] Moreover, as stated by one of the authors of Section 628, "exclusive programming that is not designed to kill the competition is still permitted."(emphasis added)[78] Cable systems have generally developed without effective competition and it is recognized that if "facilities-based"[79] competition is to develop, access to programming is an essential prerequisite. We thus believe and find it entirely consistent with the objectives of the Act that, while exclusivity may be shown to be in the public interest in certain circumstances, the burden must be on the party seeking exclusivity to demonstrate persuasively that it is justified.

64. Public Interest Standard. As for the appropriate standard to be

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[77] 1990 Cable Report, 5 FCC Rcd at 5031.

[78] Congressional Record, July 23, 1992 at 6534 (Statement of Representative Tauzin).

[79] "Facilities-based competition" is a term used in the legislative history of the Act to emphasize that program competition can only become possible if alternative facilities to deliver programming to subscribers are first created. The focus in the 1992 Cable Act is on assuring that facilities-based competition develops. See, e.g., Conference Report at 93 ("The conferees intend that the Commission shall encourage arrangements which promote the development of new technologies providing facilities-based competition to cable ....").

applied when making this public interest determination, we do not believe that it is necessary or consistent with the statutory language to articulate a single standard in this proceeding that can govern the public interest assessment generally. We note that the §628(c)(4) factors are sufficiently broad to incorporate many of the proposed standards that have been suggested. However, we believe, at least at the outset, that it is more consistent with the statute to require individual, case-by-case determinations using the five statutory criteria specified. This flexible approach will permit us to evaluate and weigh each factor within a specific fact situation. We emphasize, moreover, that we believe that the statute requires that the burden be placed on the proponent of exclusivity to demonstrate that exclusivity is in the public interest.

65. Many commenters urged us to particularize in advance, by rule if possible, specific situations in which it could be established that an exclusive contract would be in the public interest. For example, many commenters argue that exclusivity is essential for the development, promotion and launch of new programming services. One commenter suggests that exclusivity should be prohibited only if it deprives an MVPD of a vital program service necessary to its competitive survival;[80] another suggests that exclusivity should be permitted if "substitute" programming is available;[81] another suggests that a party seeking to enforce cable-only exclusivity must make a positive showing that such exclusivity will not preclude effective competition.[82] Particularly with respect to new programming, we recognize that there may well be circumstances in which exclusivity could be shown to meet the public interest test, especially when the launch of local origination programming is involved that may rely heavily on exclusivity to generate financial support due to its more limited appeal to a specific regional market.[83] The record is insufficient, however, on this point, or with respect to the other suggestions received, to support a general finding or to identify appropriate general limitations on, for example, such factors as the permissible duration of exclusivity.[84] Thus, we will handle such exclusivity proposals on a case-by-case basis in order to tailor the scope of any specific

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[80] TCI at 28.

[81] Discovery at 26-27.

[82] Attorneys General at 13.

[83] For example, it is possible that local or regional news channels could be economically infeasible absent an exclusivity agreement.

[84] For example, the record reflects wide disagreement on the appropriate duration of such exclusivity, with proposals ranging from two to seven years, ten years, and even longer. None of the commenters expressing a view, however, supports its proposal with any empirical evidence or concrete support to justify its conclusion. While we sought comment on whether any additional considerations were relevant to the public interest determination, the commenters did not suggest anything that is not already well within the scope of the statutory factors.

exclusivity terms granted to ensure compliance with the statutory public interest standard.

66. Approval of Contracts. We proposed in the Notice, for administrative reasons, to enforce Section 628(c)(2)(D) solely through the complaint process.[85] After reviewing the record, however, we no longer believe that such an approach would be consistent with the objectives of the Act. Section 628(c)(2)(D) states on its face that exclusive contracts in served areas are prohibited unless the Commission finds that exclusivity is in the public interest. Thus, as many commenters observed, the statute itself requires that the Commission make an affirmative finding that a specific exclusive contract meets the statutory public interest standard before the contract can be enforced.

67. Thus, we will require any vertically integrated programmer or any cable operator seeking to execute an exclusive contract to seek and obtain our public interest judgment before doing so. This may be accomplished through the submission of a petition containing those portions of the programming contract relevant to exclusivity to the Commission for approval, along with a statement setting forth the petitioner's reasons that support a finding that the contract meets the public interest test that addresses each of the five criteria outlined in Section 628(c)(4).[86] The petition will be placed on public notice for 30 days, and any MVPD that actually or potentially competes with the cable operator may file an opposition,[87] arguing that under the statutory criteria, exclusivity in this case is not in the public interest.[88] If a formal opposition is filed, the ex parte rules governing restricted proceedings will

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[85] See Notice at 202.

[86] The portions of the contract that we consider relevant to exclusivity would include any description of the programming service, the extent and duration of exclusivity, and any other terms or provisions directly related to exclusivity or that would support the public interest finding with respect to any of the factors set forth in Section 628(c)(4).

[87] In view of the underlying purpose of Section 628 -- to promote a competitive multichannel video marketplace -- we believe parties with sufficient standing to challenge an exclusive arrangement will be those alternative distributors that provide actual or potential competition in any area covered by the program contract. A similar analysis will be applied when evaluating discrimination complaints. See discussion of complaint process for discrimination, infra.

[88] To determine whether a challenging MVPD actually or potentially competes with the cable operator in question, we will employ the same competition standard used for purposes of discrimination complaints. See discussion of complaint process for discrimination, infra. If, however, a programming vendor seeks a general ruling in favor of exclusivity (i.e., for development and launch of a new programming service) and does not specifically identify markets in its petition for which exclusivity is sought, then any MVPD will be considered to be a "potential" competitor entitled to challenge the petition.

be applied.[89] The petitioner will have ten days to respond, and the Commission will rule on the petition.[90] If the Commission determines that the petitioner has appropriately addressed the statutory criteria and made a persuasive public interest showing, it will issue an order granting the petition and approving the contract. Until any order is issued granting the petition, the exclusivity may not be enforced.

C. Issues Applicable to Both Served and Unserved Areas

68. One area of concern referenced in our Notice that is applicable to exclusive contracts for served and unserved areas alike relates to so-called subdistribution agreements. While one commenter argued the benefits and efficiencies of subdistribution agreements,[91] as we noted in our 1990 Cable Report, we are concerned that a distributor's access to programming may be impaired through the use of such agreements.[92] We note that granting subdistribution rights can be a legitimate practice for a programming vendor, but we believe that we must address any incentives for a subdistributor to refuse to sell to a competing MVPD that may be inherent in such rights. Thus, we will adopt appropriate safeguards to limit the potential for anticompetitive behavior. In particular, we will prohibit specific terms in subdistribution agreements, as suggested by the commenters, that we believe are unreasonably restrictive or are not adequately related to the subdistribution itself.[93]

69. Thus, our rules will prohibit a subdistributor from tying programming rights to other, unrelated, programming. We will also prohibit a subdistributor from requiring an MVPD to provide access to private property in conjunction with receiving access to programming. In addition, a subdistributor may not charge more for programming than the vendor itself would have been permitted to charge under the anti-discrimination provisions we also adopt today. Finally, a subdistributor will be required to respond to a request for programming within 15 days of the request. If the subdistributor refuses to sell to an MVPD, the MVPD must be able to negotiate directly with the vendor.

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[89] See 47 C.F.R. §§ 1.1200-1.1204, 1.1208.

[90] The burden of proof in this process remains on the party seeking approval of an exclusive arrangement.

[91] See Time Warner at 38-40.

[92] See 1990 Cable Report, 5 FCC Rcd at 5021. Such subdistribution agreements are generally between a programming vendor and a franchised cable operator, through which a MVPD competitor is required to purchase the vendor's programming from the franchised operator because the vendor had sold it the subdistribution rights related to its franchise area.

[93] See, e.g., NPCA at 19-20. We note that, pursuant to the requirements of Section 628(c)(2)(C), these restrictions apply only to subdistribution agreements between vertically integrated satellite cable and satellite broadcast programming vendors and cable operators.

70. With respect to time-delay requirements,[94] we disagree with those commenters who argue that they should be prohibited outright.[95] So long as such arrangements are available at the voluntary option of the MVPD regarding its own purchase and use of programming and do not become a de facto substitute for any impermissible exclusivity, we believe that they may legitimately be used to enable programming to be distributed to more viewers through additional MVPDs. If, for example, an MVPD does not want to pay the premium price for particular programming that its competitor has paid, but would rather negotiate a lower price in exchange for a reasonable time-delay limitation, we see no reason to prohibit such a transaction.[96]

D. Complaint and Enforcement Procedures

1. In General

71. Section 628(d) provides that any MVPD aggrieved by conduct it alleges to violate Sections 628(b) or (c) may commence an adjudicatory proceeding at the Commission. We thus proposed in the Notice to establish a single complaint process to govern any complaint brought under Section 628. Several commenters support the use of a complaint process derived from the Section 208 common carrier and Section 315(b) lowest unit charge complaint processes, with alternative dispute resolution (ADR) available on a voluntary basis. In addition, the commenters address the development of complaint procedures at length, offering proposals that vary widely with respect to the degree of complexity of the proceeding and the number and types of pleadings that should be allowed.[97]

72. Given the complexity of the issues involved in each type of behavior addressed by Section 628, we believe that the best approach is to describe the enforcement procedures individually, following the substantive discussion of each practice governed by this Report. Thus, we will establish herein complaint procedures for MVPDs aggrieved by alleged violations of the regulations we have set forth to implement the statutory prohibitions against exclusivity. The appropriate procedures for discrimination, undue influence and unfair practices complaints will be discussed in the relevant section below. There are, however, issues that apply generally to all complaint cases filed under Section 628.

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[94] A time-delay requirement is a requirement that a particular distributor cannot air certain programming until a specified time after it has been aired by another distributor.

[95] See, e.g., CCWCO at 4.

[96] See, e.g., Discovery at 28.

[97] In general, cable commenters suggest a more complex process with a full complement of pleadings that more closely resembles civil litigation. In contrast, alternative multichannel program distributors tend to favor a simpler process with limited pleadings that will be resolved expeditiously.

73. First, we have determined that the record does not support either the establishment of any general criteria that can be used to standardize or abbreviate our analysis of whether a complainant has made a prima facie case, or the use of any sales volume or penetration benchmarks.[98] Second, the ex parte rules governing restricted proceedings will apply to any proceeding initiated by a complainant alleging a violation of any provision of the program access rules.[99] Third, with respect to appropriate remedies, the statute provides a broad grant of authority to the Commission to fashion remedies for Section 628 violations that include all remedies available under Title V of the Communications Act, as well as the ability to establish prices, terms and conditions for the sale of programming to aggrieved multichannel distributors.[100] Thus, we believe that the only practical approach is to develop remedies on a case-by-case basis, in the context of specific facts.

74. In addition, in order to file a complaint under any provision of Section 628, we will require that the complainant first notify the vendor or cable operator of its belief that a violation of our rules has occurred, providing sufficient specificity so that the vendor or cable operator can determine the precise nature of the dispute. If the parties cannot resolve the dispute, the complainant may file a complaint with the Commission along with evidence (an affidavit or copy of a certified letter) that the required notice has been given.[101] Failure to include such evidence shall result in immediate dismissal of the complaint.

75. Similarly, we seek to dispose of as many complaint cases as possible on the basis of a complaint, answer and reply. Discovery will not be permitted as a matter of right, but on a case-by-case basis as deemed necessary by the Commission staff reviewing the complaint. We will require that any complaint

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[98] These proposals were discussed in the Notice, and received little support from the commenters. See Notice at 202. For example, Cable America maintains that considerations such as the penetration level of particular programming is inappropriate if used to justify a vendor in discriminating against one particular distributor as long as it did not discriminate against all distributors. CableAmerica at 41. In addition, Superstar and UVI believe that it is impossible to set effective benchmarks accurately reflecting the vast differences in business operations of the various programming vendors and the very different markets they serve, especially since many technical factors can affect penetration levels. See Superstar at 66; UVI at 39.

[99] See 47 C.F.R. §§ 1.1200-1.1204, 1.1208.

[100] See Section 628(e) of the 1992 Cable Act.

[101] At this time, rather than establishing a specific time period for the parties to attempt to resolve the dispute before an aggrieved MVPD may file a complaint, we will allow the aggrieved MVPD to determine the appropriate duration of negotiations. At a minimum, however, the MVPD must provide the potential defendant ten (10) days to respond to the notice, and allow a reasonable time thereafter for negotiations.

filed pursuant to Section 628 must be filed within one year of the date on which one of the following occurs: (a) the vendor enters into a contract with the complainant, which the complainant alleges to violate Section 628; (b) the vendor offers to sell programming to the complainant pursuant to terms that the complainant alleges to violate Section 628; (c) the complainant notifies a vendor that it intends to file a complaint based on a request to purchase or negotiate to purchase the vendor's programming, or a request to amend an existing contract pertaining to such programming to bring the existing contract into compliance with the new program access requirements adopted herein, that has been denied or unacknowledged allegedly in violation of Section 628.

2. Exclusivity Complaint Cases

76. Complaint. When filing an exclusivity complaint, the burden of proof is on the complainant MVPD to make a prima facie showing that it has attempted to obtain programming for distribution into a specified area, and that it has been unable to obtain such programming due to a prohibited exclusive arrangement (either directly or through a subdistribution arrangement that violates our rules) between a vertically integrated programming vendor or satellite broadcast programming vendor and a cable operator. The complaint must identify both the programmer and cable operator who are parties to the alleged prohibited agreement. The complaint must be supported by documentary evidence of the violation, or an affidavit (signed by an officer of the complaining MVPD) setting forth the basis for the complainant's allegations. The complainant must also demonstrate that the relevant vertically integrated programming vendor meets the attribution standards adopted herein. The complainant must also establish that it has attempted to purchase the relevant programming and has been refused or unanswered. In addition, the complainant must establish that it can or does serve the area specified in the complaint, and must provide some evidence, either documentary or an affidavit setting forth the basis for complainant's belief, that the alleged prohibited exclusive arrangement governs such area. Finally, the complaint should specify the relief requested.

77. Answer. The defendant vendor or cable operator will be given thirty (30) days to file an answer refuting the complainant's allegations. If the defendant is the vendor, or a cable operator selling the programming pursuant to a subdistribution agreement, the answer should include the defendant's reasons for refusing to sell the subject programming to the complainant. In addition, the defendant will be permitted to submit its programming contracts, along with a certification that it has submitted or fully described all relevant contracts (written and oral), that relate to the area specified in the complaint. The written contracts will then be subjected to an in camera inspection by the Commission and the complainant (pursuant to a protective order) to determine whether they contain provisions relating to exclusivity. If there are no contracts or agreements relating to the specified area between the vendor and cable operator identified in the complaint, the defendant will so certify. The burden will be on the defendant to establish that it does not have prohibited exclusivity arrangements governing the area specified in the complaint.

78. Any contracts or proprietary information submitted by a vendor with its

answer may be submitted pursuant to a request for confidentiality.[102] The complainant will be granted access to any such contracts or proprietary information provided it agrees to abide by the terms of a protective order that limits access to such information and limits the purposes for which any information obtained through the Section 628 complaint process may be used.[103]

79. Reply. The complainant will be given twenty (20) days to file any necessary reply to the arguments and/or defenses contained in the defendant's answer. The complainant will not be permitted to submit new evidence or allegations in its reply. The reply must be limited to responding to the answer to the complaint.

80. Staff Determination. Upon the close of the pleading cycle, Commission

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[102] See Section 0.459 of the Commission's Rules.

[103] The complainant will be required to take reasonable steps to prevent unauthorized access to protected documents and information. Access will be limited to the individual complainant, the attorneys listed with the Commission as the representatives of the complainant, their staffs and any expert advisors or analysts. The complainant is responsible for informing anyone with access to protected information that the documents or information contained therein may not be disclosed to anyone or any entity other than the Commission. The vendor may require the complainant to disclose in writing the names of all persons who have access to documents and written information subject to the protective order. The information contained in any proprietary materials may not be disclosed to any person not authorized to receive such information, and may not be used in any activity or function other than the prosecution or defense of the case before the Commission. Each individual who is provided access to the information by the opposing party shall sign a notarized statement, or shall certify under penalty of perjury, that the individual has personally reviewed the Commission's regulations and understands the limitations they impose upon the signing party. No copies of proprietary materials may be made except copies to be used by authorized persons. Each party will be required to maintain a log recording the number of copies made of all proprietary information and the persons to whom the copies were provided. Upon termination of the proceeding, all originals and reproductions of any proprietary materials, along with the log recording persons who received copies of such materials, will be provided to the producing party. Upon final termination of the proceeding, any notes or other work product derived in whole or in part from the proprietary materials of an opposing or third party shall be destroyed. The parties may agree to additional reasonable measures to protect the confidentiality of information as the circumstances may require. Such agreement should be confirmed in writing and filed with the Commission. Any failure to abide by the terms of the protective order may result in the imposition of sanctions, including dismissal of the complaint, or censure, suspension or disbarment of the attorneys involved. See Section 1.24 of the Commission's Rules.

staff will review the complaint, answer and reply.[104] If the record does not support complainant's allegations that a prohibited exclusive arrangement exists between a vertically integrated programming vendor and a cable operator that governs the specified area to which complainant seeks to deliver the subject programming, the complaint will be dismissed. Thus, if the defendant has submitted its contracts to the Commission and complainant, and such contracts do not include provisions relating to exclusivity, the complainant will not make a prima facie case unless, in its complaint, it has provided other evidence to support its claim that an exclusive arrangement nonetheless exists.

81. If the staff determines that a prohibited exclusive arrangement does exist, it will order relief and impose sanctions as it deems appropriate. With respect to remedies, if we find that a vertically integrated programming vendor has entered into a prohibited exclusive arrangement with any cable operator, we believe that such determination will render the exclusivity unenforceable. Thus, we may order the vendor to make its programming available to the complainant on the same terms and conditions, and at a non-discriminatory rate, as given to the cable operator. In addition, we may impose sanctions available under Title V of the Communications Act. We do not believe, however, that the 1992 Cable Act grants the Commission the authority to assess damages against the programmer or cable operator. In the unusual circumstance that an exclusivity complaint cannot be resolved on the basis of the pleadings, the staff shall have the authority to order any necessary discovery pursuant to the procedures outlined below for discrimination complaints.[105] Interlocutory applications for review shall be permitted only after the staff has ruled on the merits.[106] Either party may file an application for review directly to the Commission of any staff decision on the merits.

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[104] Additional pleadings will not be considered, except in extraordinary circumstances or unless requested by the staff. We intend to keep pleadings to a minimum to comply with the statutory directive for an expedited adjudicatory process.

[105] See discussion of complaint and enforcement procedures regarding price discrimination, infra. Confidential or proprietary information exchanged during discovery will be subject to the same type of protective order discussed above. Finally, extremely complex cases may be referred to an ALJ for an evidentiary hearing. The ALJ's decision on the merits may be appealed directly to the Commission.

[106] With respect to review of interlocutory matters, the procedural rules adopted herein for Section 628 complaints will be modeled after the rules governing interlocutory review in adjudicatory hearings before administrative law judges. See, e.g., 47 C.F.R. §§ 1.291-1.298, 1.301.

VII. PROHIBITIONS AGAINST DISCRIMINATION

Background

82. Section 628(c)(2)(B) requires the Commission to:

> prohibit discrimination by a satellite cable programming vendor in which a cable operator has an attributable interest or by a satellite broadcast programming vendor in the prices, terms, and conditions of sale or delivery of satellite cable programming or satellite broadcast programming among or between cable systems, cable operators, or other multichannel video programming distributors, or their agents or buying groups; except that such a satellite cable programming vendor in which a cable operator has an attributable interest or such a satellite broadcast programming vendor shall not be prohibited from --
>
> > (i) imposing reasonable requirements for creditworthiness, offering of service, and financial stability and standards regarding character and technical quality;
> > (ii) establishing different prices, terms, and conditions to take into account actual and reasonable differences in the cost of creation, sale, delivery, or transmission of satellite cable programming or satellite broadcast programming;
> > (iii) establishing different prices, terms, and conditions which take into account economies of scale, cost savings, or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor; or
> > (iv) entering into an exclusive contract that is permitted under subparagraph (D).

83. The Notice sought comment on how we should identify discriminatory practices and on whether there are any objective standards that we could use to distinguish prohibited discriminatory behavior -- with respect to pricing or other practices -- from permitted legitimate business behavior that may occur in the marketplace for video programming. We also sought comment on examples of sales practices for certain types of programming that may require a graduated pricing structure in order to facilitate broad distribution of that programming, as well as situations in which a requirement of uniform pricing could reduce the amount of programming available to subscribers. In addition, we sought comment on the appropriate showing that a complainant should have to make when alleging discriminatory conduct, any possible presumptions that we could incorporate to guide our analytical process, and a proposed approach for assessing whether a particular price differential is legitimate under the statute or discriminatory. In particular, we sought comment on how we should apply the factors set forth in the statute that can be used to justify price differentials, the types of data that we should require vendors to submit when relying on these factors to explain a price differential, and any measures that we could employ as proxies for permissible causes of price differentials. We also asked whether the statute permits us to consider other economic factors not mentioned in the statute as legitimate explanations for price differentials, particularly if use of these factors would arguably increase the availability of programming.

84. In distinguishing between justifiable and discriminatory price differences, we sought comment on four options that might be useful in guiding our analysis: (1) developing a specific allowance for a "reasonable" price differential; (2) using principles enunciated in Section 202 of the Communications Act; (3) drawing on antitrust standards; and (4) applying price comparisons used in other regulations, such as the "anti-dumping" analysis used in the context of international trade.[107] In addition, given that Section 628(c)(2)(B) applies to "agents" and "buying groups" of cable systems and other multichannel video distributors, we sought comment on how to define the class of entities covered by this provision, as well as on whether we should establish requirements that such "agents" or "groups" must meet in order to be able to prosecute a complaint under Section 628(c).

Comments

85. In general, most alternative MVPDs advocate Commission regulations that would enable them to establish a prima facie claim of discrimination based on a simple difference in price, terms or conditions for the provision of programming.[108] According to these distributors, the burden would then shift to the programming vendor to justify the different treatment based on costs or the other factors enumerated in the statute. They claim that such burden shifting is appropriate because a complaining distributor will not know the factors that underlie a particular price differential; this information would still remain in the vendor's possession. On the other hand, programming vendors advocate including additional elements as the standard for a prima facie case. For example, some recommend that the Commission require MVPDs to show (1) that any differentials are unjustified;[109] (2) some showing of harm to competition;[110] (3) a loss of specific subscribers to a competitor that received more favorable terms;[111] (4) that the competitor to whom they wish to be compared is a similarly situated entity; or (5) that the services offered are "like" services.[112]

86. Standards Proposed in the Notice. With respect to the proposed standards for identifying discriminatory conduct, some commenters object to using any of the standards, stating that Section 628 provides its own standard that should not be broadened or altered by the Commission.[113] Some commenters

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107 See Notice at 104.

108 See DirecTv at 21, NRTC at 15-16, CATA at 4, WJB at 13.

109 See, e.g., EMI at 4.

110 See, e.g., Viacom at 21-22, NCTA at 8.

111 See Viacom at 21-22.

112 See Liberty Media at 20-21, Superstar at 47; cf. NRTC 26-29.

113 See DirecTv at 20, NRTC Reply at 18.

assert that the Commission could apply any of the options, or some combination thereof, provided that the procompetitive purposes of the Act are fulfilled.[114] Many programming vendors and MSOs specifically support an allowance for a "reasonable" region of price differentials and recommend criteria for establishing its bounds.[115] By contrast, many parties object to allowing a "reasonable" range for price differentials, including: (i) MVPDs arguing that the standard would undermine the statute's intended result of making any price difference presumptively illegal;[116] and (ii) commenters with cable interests that believe the Commission could not set appropriate bounds given the diverse factors that cause price differentials.[117]

87. Several MVPDs and programming vendors support a standard based on Section 202 of the Communications Act, which prohibits discrimination by common carriers,[118] stating that such a standard (i) would most closely apply to multichannel video services, (ii) reflects the provisions of Section 628, and (iii) is familiar to the Commission.[119] Other commenters suggest modifying the Section 202 standard, particularly with respect to the methods the Commission has developed when applying that provision to analyze costs[120] and define

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114 APPA at 22-25; see also Liberty Media at 42.

115 For example, Time Warner suggests using three price categories, one for irrebuttably reasonable differences of plus or minus 15%, one for rebuttably reasonable differences and one for rebuttably unreasonable differences. Viacom supports a irrebuttable legal zone of 30% differences. See also TCI at 13, Landmark at 15, NCTA at 22-23, suggesting a region based on the conduct of nonvertically integrated programmers, and IFE at 10, suggesting a benchmark based on a significant percentage difference in subscribers' bills.

116 See, e.g., DirecTv at 21, NRTC at 19, CableAmerica at 29, Bell Atlantic at 6-7, WCA at 47-48, APPA at 23-24.

117 See Superstar at 53-54, Liberty Media at 45.

118 47 USC Section 202 (a) provides that "it shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage."

119 See Nynex at 11-12, Superstar at 56-57, WCA at 39, Bell Atlantic at 6-7, ACC at 9-10, and UVI at 12.

120 DirecTv at 23.

"like" services.[121] Some parties oppose use of the standard because the Cable Act did not intend to import common carrier concepts into the video programming business;[122] they further claim that the "like" services issue is irrelevant because any form of discrimination is unlawful under Section 628.[123] Most commenters oppose using an antitrust standard to develop program access regulations on the grounds that (i) the Cable Act was intended to provide remedies beyond those available in antitrust cases;[124] (ii) antitrust analysis is related to the sale of goods or commodities and not services; and (iii) antitrust precedents do not readily apply to video programming where one service is not necessarily a substitute for another.[125] Regarding price comparisons used in other statutes, particularly in anti-dumping cases, virtually all parties state that these principles would not easily translate to markets where the allegedly "discriminatory" prices are artificially high rather than too low.[126]

88. Justifications Specified in the Statute. Commenters generally agree that program vendors may justify price differences for programming according to the factors enumerated in the statute. With respect to cost differences, most commenters state that the delivery of programming to certain types of MVPDs does impose greater costs on the vendor, particularly with respect to service to home satellite dish distributors.[127] This assertion is based on the alleged necessity of providing the complete distribution path to each dish owner as opposed to using the facilities of a cable, MMDS or SMATV operator,[128] as well as the higher advertising, customer service, scrambling and copyright costs incurred for HSD service.[129] As a related issue, commenters differ on whether we should permit a vendor to take into account cost differences at the retail level, or those differences in costs incurred by distributors in serving

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121 Id. See also ACC at 9-10, supporting the use of Section 202 with specific definitions of cable, DBS, wireless cable, MMDS and other technologies as "like" services to prevent the argument that certain services are not like.

122 See TCI at 14.

123 See NRTC at 21.

124 See, e.g., DirecTv at 22, WCA at 38-9, NRTC at 22.

125 See Attorneys General at 11.

126 See DirecTv at 22, NRTC at 23, NCTA Reply at 32-33, WCA at 39.

127 See EMI at 3, Superstar at 49, Turner at 10, Liberty Media at 37; cf. NSPN regarding SMATV operators and Souris River regarding HSD distributors.

128 See UVI at 7, Liberty Media at 37.

129 NRTC argues that cost issues will depend on unique facts and should be resolved on an ad hoc basis. See NRTC at 18.

subscribers, when justifying a price difference.[130] With respect to using volume-related factors for justifications, MVPDs stress that the Commission should only permit volume justifications that are applied without regard to the distribution technology.[131] Vendors assert that economies of scale are difficult to measure and urge that the implementing rules include a presumption that, in the absence of evidence that different prices are designed to deny access, negotiated programming prices reflect economic benefits attributable to the number of subscribers served by the distributor.[132] Regarding a vendor's use of price differentials to address concerns about creditworthiness and financial stability, commenters state that such terms should have a generally accepted meaning reflecting the likelihood that the programmer will receive timely payment.[133] Finally, commenters recommend that a variety of contract terms be allowed under the "offering of service" factor, including incentives for penetration to a greater number of subscribers or to individual systems for MSOs;[134] a distributor's commitment to marketing services;[135] the retail price charged to consumers;[136] the risk of supporting a new service;[137] contract duration;[138] and channel positioning or tier.[139] One commenter also cautions that it is difficult to quantify these "offering of service" factors because they vary from vendor to vendor.

89. Buying Groups. With respect to buying groups and agents, most commenters believe that buying groups perform a useful function and should receive the benefits of discounts based on subscriber volume. Programming vendors, however, assert that we should require such groups to agree to unitary

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130 See, e.g., Viacom at 16, Liberty Media at 37, and WCA Reply at 20.

131 See, e.g., ESPN at 5, TCI at 18-19, Small Systems Operators at 9.

132 See, e.g., Superstar at 51. Time Warner and Viacom also argue that volume discounts should not have to reflect specific costs justifications, with Bell Atlantic opposing this perspective.

133 Superstar at 51, Time Warner at 23-27. Viacom also offers statistics showing a greater bad debt problem with MMDS and SMATV operators than with cable customers. People's Cable, on the other hand, describes how some program vendors charged a higher rate and required greater credit guarantees for programming sold to their wireless cable system than to their cable system despite the fact they were both operated by the same company.

134 See Viacom Reply at 7.

135 See Continental at 11-20, Viacom at 41.

136 Id. Peoples Choice at 2, Time Warner at 26.

137 See Liberty Media at 35, Turner at 11, Discovery at 22, Viacom at 18.

138 See DirecTv at 25.

139 See Continental at 11-20.

treatment in order to prosecute a complaint under Section 628(c). In particular, they propose that we adopt requirements mandating agreements for joint and several liability by all members, guarantees for the technical performance and signal security of each member, and joint marketing strategies. NSPN, a buying group for SMATV operators, objects to these conditions, stating that they are unrealistic and unattainable because, for instance, the buying group as the contracting party should be responsible for payment rather than individual members.

90. Complaint Process. With respect to procedural issues, numerous commenters provide specific proposals for the allocation of burdens of proof and what should be required of a complainant to establish a prima facie case of discrimination. For example, SBCA advocates placing the initial burden of proof on the complainant to establish that it has standing, that there is evidence of a differential in price, terms or conditions and that all other requirements of the Act and FCC rules have been met. The defendant would have the opportunity to refute the complainant's allegations. SBCA then suggests that the Commission instruct the parties to negotiate a settlement within 20 days. If no agreement is reached, the complaint would move to adjudication and the burden of proof would shift to the programming vendor to justify the differential shown. If the differential is justified, the burden would shift back on the complainant to show that the proffered justification is either a pretext or is inadequate.[140]

91. DirecTv proposes a similar process, but includes a requirement that the complainant demonstrate in its complaint that it has previously made a bona fide attempt to negotiate with the programmer.[141] DirecTv further contends that a complaint filed under any provision of Section 628 should be deemed sufficient if supported by an affidavit by an officer of the complainant MVPD, and that once the complaint is filed, the burden of proof should shift immediately to the vendor or distributor to show that the allegations in the complaint are untrue.[142] Time Warner contends that any discrimination claim should be supported by an affidavit or other documentation showing that the defendant extended the competitor of the complainant more favorable terms.[143] CableAmerica adds that, in order to make a prima facie case, a complainant must also allege either an anticompetitive purpose, or must show that the alleged behavior prevented or significantly hindered the complainant from providing programming to its customers.[144] CableAmerica agrees, however, that the burden of proof should be on the defendant because it is in a better position to present any justifications for its conduct.[145]

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140 See SBCA Reply at 8-12.

141 See DirecTv Reply at 12-15.

142 Id.

143 Time Warner at 47. See also CCWCO at 4.

144 CableAmerica at 41. See also Rainbow at 18, TCI at 39.

92. In contrast, UVI contends that the burden of proof should remain on the complainant and disagrees with commenters who assert that the burden of proof should shift to the vendor if there is any differential in price.[146] UVI also argues that the effect of a SBC vendor's pricing practice must be examined from the perspective of an adverse effect on consumers before any case can be made for discrimination, and that a complaint must provide specific evidence that the effect of the vendor's actions is to significantly hinder program distribution in the marketplace including (1) a description of the geographical boundaries in which the alleged discrimination occurred, (2) a list of all television services available in any part of the geographical boundary, (3) current program prices and penetration figures, and (4) proof that the complainant has actively marketed services within the area.[147]

93. Discovery. With respect to discovery, CableAmerica urges the FCC to expedite the discovery process, and to be guided by recent amendments to the federal rules of civil procedure (FRCP).[148] Liberty Media suggests that the number and scope of discovery disputes can be significantly reduced through adoption of a rule similar to FRCP Rule 37(a)(4), which requires the party necessitating the filing of a motion to compel to pay the reasonable expenses and attorneys fees of the prevailing party unless the court finds that the losing party's position was substantially justified.[149] DirecTv proposes that discovery be conducted in the form of a specific questionnaire that would include standardized interrogatories for all Section 628 complaints, that the vendor must complete and submit to the FCC and complainant.[150] U.S. West argues that the FCC should allow pre-complaint discovery similar to that allowed under FRCP Rule 27(a), to enable complainants to determine whether there is any basis for a complaint where unique contracts rather than standard pricing matrices are used.[151]

94. Rainbow, however, argues against pre-complaint discovery, and states that discovery should be limited to that necessary to meet the complainant's burden of proof or to rebut its prima facie case. Further, the complainant should be required to demonstrate the need for evidence claimed by a vendor to be confidential or proprietary.[152] Time Warner believes that discovery should

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[145] CableAmerica at 41. See also ACC at 12, CATA at 7, and NRTC at 30.

[146] UVI Reply at 6.

[147] See UVI at 38-39; UVI Reply at 5.

[148] CableAmerica at 42.

[149] Liberty Media at 63.

[150] DirecTv Reply at 14.

[151] U.S. West at 16.

[152] Rainbow at 19.

not be permitted as a matter of right, but only upon a demonstration of particularized need.[153] Liberty Media suggests that the FCC should set limits on discovery, and that initial discovery should be limited to a specified number of interrogatories.[154] TCI believes that a defendant should be entitled to discovery to challenge the effects of alleged discriminatory behavior on the complainant.[155] Finally, several parties support the Commission's proposal regarding the issuance of protective orders for materials exchanged during discovery.[156]

Discussion

95. As a general matter, we believe that discrimination under Section 628(c) exists when the same or essentially the same programming service is sold to competing distributors at different prices or pursuant to different terms or conditions.[157] Such discrimination is prohibited if not justified under one or more of the specific factors enumerated in the statute.

A. Definitions of "Competing" and "Similarly-Situated" Distributors

96. "Competing" Distributors. Because Section 628 is intended to prevent and remedy anticompetitive conduct in the multichannel video marketplace, we believe that complaints of discriminatory conduct should logically involve competing distributors. Thus, when addressing a Section 628 complaint, we will require that a complainant demonstrate that it has been offered or is paying a higher price, or has received less favorable terms, than a competing distributor. In establishing that another distributor is a competitor for these purposes, we will require that there be some overlap in actual or proposed service area. Moreover, the geographic market for assessing whether distributors compete with each other (either actually or potentially) can be local, regional or national, depending on how the distributor buys and distributes programming. For example, certain locally-oriented distributors, such as cable, MMDS and SMATV operators, compete directly within a particular local market. Such distributors therefore will generally file discrimination complaints if another local distributor received a more favorable programming contract. With respect to nationally-oriented competitors that buy programming and serve subscribers beyond a local or regional market -- such as DBS and HSD distributors -- parties may make complaints based on comparisons between

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153 Time Warner at 47.

154 Liberty Media at 63.

155 TCI at 42.

156 See, e.g., CableAmerica at 42, TCI at 42-43.

157 The statute and comments focus on price discrimination by a programming vendor in selling programming to distributors, although Section 628 also encompasses non-price forms of discrimination. Although the discussion that follows is also focused primarily on price discrimination, the principles set forth here will generally apply to non-price as well as price terms.

contracts of national competitors, provided that the complaint includes a justification for that comparison.[158]

97. We believe that this approach for defining the relevant geographic market for competing distributor is the most reasonable approach when analyzing discrimination complaints. Where local competition actually occurs, we should not permit a distributor alleging discrimination to draw comparisons to another distributor operating outside the bounds of that competition. Similarly, where national competition actually occurs, we should not constrain a complainant to drawing comparison to local or regional distributors.

98. "Similarly Situated" Distributors. In order to distinguish between legitimate practices and prohibited discriminatory conduct, we also believe that a discriminatory practice must involve the offering of the program service to similarly-situated distributors. Indeed, while a vendor may sell the same satellite programming service to various distributors, both the statute[159] and the record recognize that the prices, terms and conditions of the contracts will reflect the particular attributes of the distributor and its willingness to provide certain secondary services in return for receiving the programming service. We thus believe that in analyzing allegedly discriminatory conduct, we must consider not only whether the two distributors being compared are competitors, but also whether the differences in their programming contracts are justified under the statutory factors governing permissible price differentials.

99. Therefore, in evaluating a discrimination complaint, we believe that it will often be useful to conduct a two-step analysis. First, we will compare the difference in programming prices (or terms or conditions) paid by (or offered to) the complainant and the competing distributor. Second, we will allow the programmer to justify the difference under the statutory factors by either (i) submitting a showing that one or more of the factors is involved and the price differential reflecting those factors is reasonable, or (ii) submitting an alternative contract for a more reasonably comparable, or more "similarly situated", distributor.[160] Although such a contract will not

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158 With respect to "buying groups" or agents representing multiple distributors, the comments support our proposal to require such entities and their members to agree to unitary treatment for many other relevant purposes, including billing and liability. In the context of defining "competing" distributors, our rules will require buying groups to draw initial comparisons for "competition" based on such unitary status, using a national or local relevant market depending upon whether their operations are fundamentally national or local. Accordingly, buying groups that are fundamentally local in operation must draw comparisons with respect to competitors that have some overlap in actual or proposed service area. Buying groups that are fundamentally national in operation may make initial comparisons with respect to vendors' contracts with a national competitor, provided that the complaint includes a justification for that comparison.

159 See Section 628(c)(2)(B)(i)-(iv).

necessarily provide definitive evidence that the price difference can be explained under the statutory factors, we believe that it will often be useful in assessing whether the programmer has adequately explained the difference. For purposes of evaluating alternative contracts offered by programmers, we will define a distributor as "similarly situated" with respect to the complainant if it operates within a proximate geographic region, has roughly the same number of subscribers, and purchases a similar service, while also using the same distribution technology as the "competing" distributor with whom the complainant seeks to compare itself.[161] We emphasize that an analysis of "similarly situated" distributors may be useful in demonstrating that the vendor has offered comparable terms to distributors with similar attributes. However, additional evidence may be needed to establish that the magnitude of a price difference for a consistently applied term (such as a standard volume discount) is reasonably justified under the statute's permissible factors.[162]

100. We believe that this general approach toward identifying discriminatory

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[160] Of course, programmers will be free to provide other evidence, such as a rate card, in support of its case that the price difference can be explained under the statutory factors.

[161] We emphasize that any alternative contract submitted by a defendant programmer must involve a distributor that uses the same technology as the "competing" distributor identified by the complainant as the recipient of more favorable treatment. In this manner, we may properly compare the prices charged to each distributor in order to ensure that the price differential identified by the complainant does not occur as a result of a vendor's systematic discrimination against a particular technology relative to cable operators. Therefore, as an example, an MMDS operator may allege that it is paying a higher price for a programming service than a particular cable operator as a "competing" distributor. In response, the program vendor may seek to justify the price differential by submitting a contract with a "similarly-situated" cable operator -- i.e., one that is located in the same general region, serves a similar number of subscribers, and purchases a similar service or package as the MMDS operator. Of course, the price charged to the MMDS operator may legitimately reflect differences in costs incurred by the vendor in serving the MMDS operator as compared to cable operators, if those cost differences are adequately demonstrated, as well as other standardized, technology-neutral discounts or surcharges.

[162] For example, the analysis of a price differential may consider the cost differences that a vendor experiences in selling programming to distributors using different technologies. Likewise, this analysis would likely consider certain distinctive terms of a programming contract, such as those issues enumerated under "creditworthiness" and "offering of service", infra. We would not include the consideration of cost differences or standardized discounts or surcharges under the analysis of similarly situated distributors, which will seek to establish an appropriate preliminary basis for price comparisons by focusing on the number of subscribers, region of operation, program package purchased, and distribution technologies for the identified parties.

conduct -- and our accompanying enforcement process -- fulfills the legislative requirement to specify particular conduct that is prohibited by Section 628(b) of the Act. Moreover, the regulations regarding discrimination carefully weigh the many facets of the 1992 Cable Act as balanced with the complex dynamics of the marketplace for satellite cable programming and satellite broadcast programming. We believe that these regulations will effectively prohibit discriminatory practices by programming vendors, while still following the statute's objectives to "rely on the marketplace, to the maximum extent feasible, to achieve greater availability" of the relevant programming.[163] In this regard, we believe that certain practices involving price differentials benefit the public by increasing the availability of programming -- as well as reducing the price of service -- to consumers. For instance, we conclude that our rules must allow for fundamental differences in pricing of satellite cable programming as opposed to satellite broadcast programming, because satellite broadcast programming vendors face a unique, artificial ceiling on program prices as well as comparative ease of entry barriers for potential competitors seeking to offer the same signal.[164] In addition, we also recognize that certain regional programming services use a form of graduated prices to promote broad distribution of the service into more distant communities.[165] We also believe that our regulations regarding discriminatory practices will satisfy the stated policy of Congress to "ensure that cable operators continue to expand, where economically justified, their capacity and the programs offered over their cable systems."[166] Furthermore, we believe that faithful implementation of the statute requires us to allow for differences based on the permissible factors enumerated in Section 628(c)(2)(B)(i)-(iv), as defined below, and that we must deny claims of discrimination resulting from factors that the 1992 Cable Act has established as entirely justified and reasonable. In establishing these implementing regulations, we also emphasize that it is essential to identify and preserve legitimate differences in pricing behavior so that programming vendors may continue to market their services creatively to all distribution technologies and achieve widespread availability and penetration to all subscribers. In this regard, we stress that our effort in this proceeding has been to "serve the congressional intent to prohibit unfair and anticompetitive actions without restraining the amount of multichannel programming available by precluding

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163 See 1992 Cable Act, Section 2(b)(2).

164 Given the virtual lack of entry barriers for potential competitors to satellite broadcast programming, vendors of such programming are constrained to set their prices below a potential competitor's cost of obtaining the signal directly from the satellite. If the vendor's price exceeds this cost, the potential competitor has an incentive to obtain the signal directly rather than purchase it from the vendor. See UVI at 6, Superstar at 6.

165 We note that, subject to our provisions governing unfair and discriminatory practices, such "concentric pricing" of regional services is not per se discriminatory to the extent that the pricing graduations are technology neutral, and remain consistent within each price graduation.

166 See 1992 Cable Act, Section 2(b)(3).

legitimate business practices common to a competitive marketplace."[167]

B. General Approaches to Identifying Prohibited and Permitted Discriminatory Conduct Proposed in the Notice

101. The Notice proposed several possible objective standards that might be used for separating prohibited discriminatory conduct from permitted actions. We also suggested that these standards would apply in the enforcement process for resolving particular complaints, thus assisting a complainant to establish a prima facie case of discriminatory conduct. We believe that the record shows that each proposed approach to price comparisons contains certain principles that could merit application in the particular context of multichannel video programming. At the same time, however, parties have underscored the conceptual weaknesses of each approach, so that a consensus for a particular proposed standard is lacking.[168] We thus conclude that none of the standards, applied independently, would provide the best or most comprehensive guide for our implementing regulations for Section 628(c)(2)(B).

102. The regulations we are adopting, therefore, are not based on any of the specific options proposed, but rather incorporate particular aspects of each standard that are applicable to the context of satellite cable and satellite broadcast programming. Regarding presumptions based on a "reasonable" range for differentials, we agree with commenters that such a "zone" is too difficult to construct so as to reflect and evaluate actual sales practices for multichannel programming, especially given the number of different factors operating in the video programming distribution market. Specific aspects of this option are useful, however, in applying the statute's justifying factors, as described below. Similarly, the definition of "discrimination" from Section 202 of the Communications Act provides some guidance when applied to the sale of communications services, but we believe that its focus on the behavior of regulated common carriers is inappropriate in the distinct context of programming vendors.[169] Also, while antitrust precedents and other regulatory approaches address related concepts that might be particularly useful in defining the permissible factors for differentials, directly importing these concepts into the Section 628 process risks confusing the two bodies of law involved, which address similar but not identical concerns.

103. We are also aware of the other recommended approaches for identifying discriminatory behavior presented in the record. In particular, certain alternative distributors claim that the existence of a price differential between two distributors, in effect, should constitute a per se violation of Section 628(c)(2)(B) and that Congress has already concluded that all

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[167] Notice at 194.

[168] The options for price comparisons proposed are discussed in greater detail, infra.

[169] The legal process model which we adopt to enforce these regulations relies heavily on our experience in processing of common carrier complaints pursuant to Section 208 for discrimination in violation of Section 202.

discrimination is unlawful under the 1992 Cable Act.[170] This approach is particularly promoted by parties who claim that we should treat distributors as a single class and who further dispute any vendor's ability to justify measurable price differences under the factors specified in the statute.[171] Although we agree that Section 628 clearly prohibits discriminatory conduct by programming vendors, the statute also explicitly allows for differentials resulting from the specific factors listed. Furthermore, as detailed below, the record reveals that distributors will have distinguishing attributes based upon the technology they employ, the number of subscribers they serve, and their ability and willingness to provide various secondary transactions and services to the vendor in exchange for programming. To the extent that these factors can be justified by the vendor on a case-by-case basis, we believe that our adopted approach will serve the public interest by prohibiting discriminatory behavior, promoting access to programming by all distributors, and increasing the amount of satellite cable and satellite broadcast programming to the public.

104. Finally, certain parties with interests in vertically integrated MSOs and programming vendors suggest that we should determine "discriminatory" pricing by comparing practices of vertically integrated entities with non-integrated vendors in order to satisfy the statute's apparent concern over the potentially adverse effects of vertical integration.[172] We reject this approach because it fails to sufficiently consider the historical allegations of discrimination on which Congress based its decisions to enact Section 628 and assumes that the behavior of a non-integrated entity is inherently justifiable. At the same time, we recognize that there may well be instances when evaluating particular complaints that the conduct of non-vertically integrated programming vendors will be informative, especially when particular discounts -- or magnitudes of discounts -- appear standard throughout the marketplace for programming.

C. Justifiable Price Differences

105. The legal process for resolving complaints will allow for justifiable differentials as specified in the statute. Under our general definitions of the four permissible factors, vendors will assume the responsibility of justifying the legitimacy of such factors in order to maintain the pricing differentials between distributors, as well as the magnitude of differences based on those factors. We will generally permit vendors to employ legitimate discounts associated with the factors specified in Section 628(c)(2)(B), provided that similar terms are standardly available to various distributors. Therefore, we adopt the following definitions and guidelines for the factors involving, in general terms: (i) cost differences at the wholesale level among distributors, (ii) volume differences, (iii) creditworthiness and financial stability, and (iv) differences in "offering of service".[173]

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170 See, e.g., DirecTv at 21; NRTC at 15-16.

171 See NRTC at 16.

172 See Notice at 195; NCTA at 20.

106. Cost Justifications. Section 628(c)(2)(B)(ii) allows a vendor to establish different prices, terms, and conditions to take into account actual and reasonable differences in the cost of creation, sale, delivery, or transmission of satellite cable programming or satellite broadcast programming. We agree with those commenters suggesting that the record in this proceeding supports the preliminary conclusion in the Notice that service to HSD distributors may be more costly than service to others using different delivery systems such as cable operators,[174] as additional costs are often incurred for advertising expenses, copyright fees, customer service, DBS Authorization Center charges and signal security. The record indicates that these cost differences are particularly evident when providing program services to HSD distributors who do not provide a complete distribution path to individual subscribers.[175] We also recognize that cost differences may occur within a given technology as well as between technologies.[176] Therefore, the adopted regulations will allow vendors to base programming prices on legitimate cost factors. Vendors will not have to use a uniform rate card, although they will incur the risk and burden of showing that the cost factors they claim cause a price differential are legitimate and are not designed to conceal prohibited discrimination.

107. The record also raises the issue of whether a vendor may take into account those cost differences incurred by distributors in providing service to subscribers -- cost differences at the retail level -- when justifying price differences for programming as charged to distributors.[177] Although we recognize that costs incurred by some distributors when delivering their services to consumers may be lower than for others (e.g., HSD vs. cable), we believe that it would be contrary to the purposes of the Act and disserve the public to allow vendors to charge higher prices based on this factor. In particular, we believe that such a result could artificially raise the retail price of programming and discourage the development of low-cost technologies contrary to the statute's goals.[178] Moreover, contrary to the claims of some

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[173] We note that Section 628 (c)(2)(B) also permits a programming vendor to make allowances for differences in "character" and "technical quality" in establishing prices for various distributors. Due to the nature of these considerations, we believe that these aspects are most appropriately considered on a case-by-case basis.

[174] Notice at 198; See SBCA Reply at 6; UVI at 7-10; Time Warner at 24-27; Superstar 53-54.

[175] See Superstar at 53-54; UVI at 7-10; Liberty Media at 37; Turner at 10.

[176] See EMI at 3.

[177] See Congressional Record, October 5, 1992 at S16671, Colloquy between Senators Kerrey and Inouye. We note that the comments are divided as to the appropriate interpretation of this colloquy. Compare Viacom at 16; UVI at 23; NRTC at 19.

commenters that HSD distributors will simply retain any savings rather than pass them on to HSD users, we believe the HSD market is sufficiently competitive to ensure that savings will inure to the benefit of the public. Accordingly, we will generally reject a vendor's consideration of a distributor's costs in delivering service to subscribers. A vendor who can show that the lower price offered to the distributor will not result in lower prices to consumers because the distributor is simply retaining the potential cost savings in the form of higher profits, can justify a price differential based on retail costs.

108. Volume Justifications. As a second consideration, Section 628(c)(2)(B)(iii) permits a vendor to establish different prices, terms, and conditions that take into account economies of scale, cost savings, or other direct and legitimate benefits reasonably attributable to the number of subscribers served by the distributor. The record in this proceeding indicates that volume-related information is often available on some rate cards through "volume discounts" based upon a distributor's number of subscribers. We observe, however, that the statute speaks of "economies of scale, cost savings, or other direct and legitimate economic benefits reasonably attributable to the number of subscribers" rather than simple volume discounts.[179] As possible standards related to volume, we could establish rules to require that rate cards reflect economies due to volume differences between distributors or adopt the recommendations of certain alternative distributors to permit only cost-based volume discounts.[180] Alternatively, other parties have argued that in addition to cost economies, a larger number of subscribers confers direct non-cost "economic benefits" by delivering more viewers, thus increasing revenue from advertising more than proportionally, and providing a larger base for amortizing the costs of the programming service.[181] We believe that this interpretation most closely follows the language of Section 628 regarding "direct and legitimate economic benefits", which distinguishes "volume differences" from the "cost differences" considered in the first permissible factor.[182] Therefore, we will permit vendors to establish pricing schedules

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178 See WCA Reply at 23.

179 We note that the language of the original House amendment regarding program access issues permitted vendors to "take into account volume discounts". See Congressional Record, July 23, 1992, at H6531. Alternatively, the Senate Bill, Section 640(b)(3), focused solely on economies of scale and cost savings.

180 See, e.g., NRTC at 25; and DirecTv at 23.

181 For example, we note that Turner argues that not only do volume discounts exist for many American products, but such pricing factors are especially justifiable for a cable program network that requires mass penetration in order to capture advertising revenues. See, e.g., Turner at 12; Viacom at 40; Liberty Media at 40; Discovery at 21; NCTA at 38.

182 On this issue, antitrust precedent under Robinson-Patman Act is instructive in showing the difficulty of demonstrating a pure cost

based on volume-related factors reflecting direct economic benefits to the extent that such pricing schedules are standardly available to similarly situated distributors. We believe that this approach to implementing Section 628(c)(2)(B)(iii) will simplify the accounting aspects of volume issues, while allowing for reasonable and legitimate price variances within the cable industry as well as between technologies. In addition, an allowance for standard or generally available volume discounts across technologies may alleviate the need to regulate the number of rate cards or matrices necessary to account for different services, especially to the extent that volume discounts have previously differed across technologies. As a procedural matter, when relying upon standard volume-related factors that are available to all MVPDs using all technologies, the vendor may be required to demonstrate that such volume discounts are reasonably related to "direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor" if unique questions arise about the application of that discount.[183] As stated earlier, we will not require the vendor to provide a strict cost justification for the structure of such standard volume factors, but will also recognize non-cost economic benefits related to increased viewership as identified by the vendor.

109. Justifications based on creditworthiness, offering of service, and financial stability and standards regarding character and technical standard. As provided in the statute,[184] our adopted regulations also will allow programming vendors to take into account a distributor or customer's creditworthiness or financial stability when it negotiates a price for a programming service. Although many commenting parties indicate that this factor is not typically manifested in price differentials but rather through other sorts of credit or payment guarantees,[185] vendors will have the right to consider this factor in developing pricing policies.[186] In doing so, vendors are permitted to create a distinct class or classes of service in pricing to reflect concerns about credit considerations or financial stability. However, any distinctions based on considerations of creditworthiness must be applied on a technology neutral basis. Although we note Viacom's statement that certain types of distribution systems have created greater "bad debt" problems, we also seek to avoid situations where individual distributors are forced to pay higher programming prices, without regard to their own creditworthiness, solely due to

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justification for volume discounts, which has effectively precluded certain uses of volume discounts and is apparently contrary to the intent of Section 628. See Federal Trade Commission v. Morton Salt Co., 334 U.S. 37 (1948).

[183] See Section 628(c)(2)(B)(iii).

[184] Section 628 (c)(2)(B)(i).

[185] See discussion regarding unfair practices, infra.

[186] We emphasize, however, that we will not permit vendors to manifest factors such as creditworthiness or financial stability in price differentials if such factors are already taken into account through different terms or conditions such as special credit requirements or payment guarantees.

the perceived creditworthiness of cable systems as opposed to wireless cable systems or other distribution means. Thus, we emphasize that our rules will not permit vendors to make creditworthiness decisions based only on the distribution technology involved. We believe our regulations correctly balance the rights of vendors and distributors while fulfilling Congressional intent.

110. The statute also directs that our regulations should allow price differentials based on differences in "offering of service". Neither the statute nor its legislative history provides much guidance on the proper definition of this term, although we believe that it refers to differences related to the actual service exchanged between the vendor and the distributor. For example, such considerations could be manifested in standard contract terms based on a distributor's willingness to provide secondary services that are reflected as a discount or surcharge in the programming service's price. Although some MVPDs such as NRTC maintain that all distributors fall into one class, we agree with commenters claiming that the flexibility from "offering of service" discounts ultimately facilitates greater availability of programming. We also recognize United Video's argument that with respect to service to the HSD market, certain distributors may have capabilities to function like other (cable) distributors, yet many of these functions duplicate aspects of a vendor's service and are not necessarily used in the programming transmission. As a result, these duplicative capabilities should not immediately lead to establishing a single class of distributors. We also believe that even if we assume a single class of distributors, the record clearly demonstrates that each distributor will seek to distinguish itself within a medium by its willingness to accept certain terms, or to provide secondary functions in return for a lower price.

111. Consequently, we adopt regulations that will allow programming vendors to establish price differentials based on factors related to offering of service. Such factors could include, for example, penetration of programming to subscribers or to particular systems;[187] retail price of programming to the consumer for pay services;[188] amount and type of promotional or advertising services provided by a distributor; a distributor's purchase of programming in a package or a la carte; channel position; importance of location for non-volume reasons;[189] prepayment discounts; contract duration; date of purchase,

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[187] For instance, a vendor may justify a price differential for an MSO that purchases a programming service for all its cable systems, rather than only selected markets. Likewise, for pay or premium services, a vendor may offer incentive discounts to encourage distributors to offer the programming service to a larger percentage of the distributor's total subscribers.

[188] As an example, a vendor may offer discounts to distributors as an incentive for lower retail prices for subscribers, especially in the case of premium services that are sold a la carte.

[189] We note that a vendor may offer discounts to secure contracts for a programming service in key markets, such as Manhattan or Los Angeles, for purposes of enhancing advertising or program production. Such discounts could appropriately apply, then, for all competitors in those markets.

especially purchase of service at launch;[190] and other legitimate factors as standardly applied in a technology neutral fashion.[191] We emphasize that this list of considerations is intended to provide examples of frequently used contractual terms, and is not exclusive; vendors may use other standardly applied "offering of service " discounts (or surcharges), to the extent that they are willing to justify such terms, as necessary on a case-by-case basis.[192]

112. Use of "rate cards". Given that our definition of "discrimination" by a vendor initially requires a price differential as compared among competing distributors, we must establish a common basis for such price comparisons and determine how to make such information generally accessible to potential complainants. We believe accurate comparisons could occur by using a vendor's "rate card," standard contracts, or other generally accepted pricing information regarding a vendor's programming service. The record in this proceeding, however, has established that vendors currently employ a variety of sales practices, and that individual vendors require considerable flexibility in establishing a mutually acceptable price in order to facilitate the continued sale of multichannel video programming under dynamic market conditions. Therefore, we will permit vendors to choose whether to use a "rate card" as well as the format and relevant pricing factors, without requiring a filing with the Commission, with the proviso that such pricing information will play an integral role in a vendor's ability to justify rate differences between competing distributors.[193] Also, we realize that distributors as potential complainants may not always have access to a vendor's pricing information. Accordingly, under the complaint process described below,

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[190] For example, a vendor could conceivably justify rate differences, or a separate rate structure, to distinguish those distributors that were "charter members" or longstanding customers of a service, provided that such discounts are or were available to distributors of any technology. Any such potential rates, however, must result from specific provisions of a contract that predates the complainant's attempt to purchase the same programming.

[191] Certain commenters have argued in favor of the merits of price differentials based upon a vendor's attempt to "meet competition" at the price level for another vendor's service. We recognize that such practices may benefit the public in certain instances by increasing the availability of programming and reducing the price of programming to consumers, and we will determine whether these benefits are likely to occur on a case-by-case basis.

[192] Vendors responding to complaints may attempt to justify practices causing a price differential under more than one statutory factor when necessary, particularly when the appropriate category is uncertain based on our rules or Commission precedent.

[193] Given the complexity created by the different uses of rate cards and other pricing techniques by programming vendors, we strongly encourage vendors to specify the factors in their contractual arrangements that affect price, and to use those contracts in resolving disputes rather than relying on the basic information on a rate card.

potential complainants may make a certified request of information from vendors; if the request is denied or insufficient information is provided for a comparison, we will allow a distributor to file a complaint without such information. Under this framework, vendors may determine their own sales practices in order to accommodate the desired level of flexibility, thus assuming their own degree of risk in proving the legitimacy of their pricing differentials. We believe that this approach will facilitate the process of resolving disputes by creating an incentive for vendors to use standard sales techniques and to make pricing information available as necessary to distributors, while simultaneously preserving a degree of flexibility for each vendor's sales preferences that might result from the unique nature of each programming service.

113. With respect to recommendations by certain commenters that we require filing of "rate cards", contracts, or other types of pricing information, we conclude that requiring vendors to file pricing materials would impose a major administrative burden on Commission resources, and could create additional problems related to the confidentiality of such information. Further, to the extent that parties have shown that standard "rate cards" generally do not exist, we believe that a filing requirement would impose an excessive constraint on vendors -- thus increasing the possibility of limiting the sale of programming -- and could diminish competitive pricing for multichannel programming through a standardization of higher programming rates as vendors become more aware of the pricing practices by competitors.

114. Buying groups. We agree with commenters that buying groups or purchasing agents can offer some economies of scale or other efficiencies to programming vendors which would justify price discounts under the statute. However, we also agree that in order to benefit from treatment as a single entity for purposes of subscriber volume, a buying group should offer vendors similar advantages or benefits as a single purchaser, including for example, some assurance of satisfactory financial and technical performance. We do not believe that it is necessary to impose size or ownership restrictions.[194] Vendors can extend the same volume discounts based on number of subscribers that they would ordinarily extend to single entities of comparable size provided that such discounts are offered in a nondiscriminatory fashion. Likewise, a strict requirement of joint marketing strategies would not appear to be feasible for a group with national membership. Marketing plans could vary significantly depending on geographic location and would appear to be more appropriately tailored to individual distributors in specific local markets. We would encourage buying groups, however, to cooperate with programming vendors on marketing strategies that would best represent the interests of their members and that would provide the economic benefits of a larger number

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[194] See, e.g., United Video at 28, suggesting that groups should be limited to situations where a single entity owns at least 51% of each member of the group. Cf. Liberty Media at 41, which states that it does not appear necessary now to limit the size of individual entities participating in buying groups provided that the total number of subscribers does not exceed whatever horizontal concentration limits are established by the Commission pursuant to Section 11 of the Act.

of subscribers.

115. Accordingly, the regulations we adopt include requirements that a buying group seeking unitary treatment from a programming vendor must agree to be financially responsible for any fees due under a contract to which it is a party.[195] Alternatively, if individual members are contracting parties, they must agree to joint and several liability for commitments of the group. In addition, group members must agree to uniform billing and standardized contract provisions. With respect to technical performance, a vendor offering unitary treatment to a purchasing group has the right to require members to agree to certain reasonable technical standards which will be guaranteed by the group entity or its individual members. A programming vendor can, of course, legitimately apply any of the statutorily permissible justification factors such as creditworthiness to buying groups in the same manner as they would be applied to individual MVPDs on a nondiscriminatory basis. These regulations appropriately balance the interests of programming vendors in receiving prompt payment and adequate technical quality for their services and those of MVPD members of buying groups in receiving any available benefits from large subscriber numbers.

D. Non-price Discrimination

116. We believe that non-price "discrimination" by a programming vendor between competing distributors is also covered within Section 628(c). While specific practices within this prohibition are not well identified or discussed by commenters, we believe that one form of non-price discrimination could occur through a vendor's "unreasonable refusal to sell", including refusing to sell programming to a class of distributors, or refusing to initiate discussions with a particular distributor when the vendor has sold its programming to that distributor's competitor. We believe that the Commission should distinguish "unreasonable" refusals to sell from certain legitimate reasons that could prevent a contract between a vendor and a particular distributor, including (i) the possibility of parties reaching an impasse on particular terms, (ii) the distributor's history of defaulting on other programming contracts, or (iii) the vendor's preference not to sell a program package in a particular area for reasons unrelated to an existing exclusive arrangement or a specific distributor.[196] Our implementation of the non-price discrimination aspects of

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[195] We note that we have extended the general requirement for unitary treatment of a buying group's members to apply in the context of our definition of geographic relevant markets, which will guide comparisons of "competing" distributors, supra. As a result, our rules for identifying "competing" distributors will treat a particular buying group as a single local, regional, or national distributor depending upon the fundamental nature of its operation.

[196] We believe that this interpretation is consistent with the specific language of Section 628. In particular, we note that Section 628(c)(3)(A) provides "Nothing in this section shall require any person who is engaged in the national or regional distribution of video programming to make such programming available in any geographic area beyond which such programming has been authorized or licensed for distribution."

Section 628(c) concerning unreasonable refusals to sell or similar exclusionary practices will draw upon certain antitrust precedents to define "unreasonable", as well as other legal principles, and will be addressed individually through the enforcement process.[197] In addition, we believe that Section 628(c)'s prohibition against non-price discrimination would also encompass situations in which a vendor refuses to offer particular terms to an individual distributor, or class of distributors, that are offered to competing distributors. This would prohibit such practices, for example, as selling programming to one distributor on an a la carte basis, but refusing to permit that distributor's competitors to purchase the same programming on the same terms or conditions.

E. Application of Rules to Existing Contracts

117. In the Notice, we observed that the statute is silent concerning enforcement of anti-discrimination rules with respect to existing contracts, and tentatively concluded that we could not apply the new rules retroactively against existing contracts.[198] We sought comment on this analysis and requested that commenters "address the extent that the Commission should implement Section 628 with respect to existing contracts."[199] We noted that if we waited for existing contracts to expire, "we may not achieve the results Congress envisioned from the requirements of Section 628 in a timely fashion given the long term nature of many programming agreements."[200] Accordingly, we requested that commenters address whether we should establish a deadline (and address what an appropriate deadline should be) for compliance that would afford parties sufficient time to renegotiate contracts. In this regard, we also sought information as to the current duration of existing contracts. We further sought comment on whether renewals of existing contracts subsequent to the adoption of the Notice should comply with the new rules. Finally, we asked commenters to address whether parties could base discrimination claims on contracts that predate the new rules.

118. Commenters opposing application of the regulations developed under Section 628 to existing contracts argue that such application would constitute illegal retroactive rulemaking.[201] They rely on Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988), and other cases, arguing that the Commission may not apply the anti-discrimination rules to existing contracts because there is no clear congressional intent to do so.[202] Should the Commission conclude, however, that it has authority to apply Section 628 to existing contracts, programmers argue that compulsory abrogation of existing

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197 See discussion of enforcement process for discrimination, infra.

198 Notice at 201.

199 Id.

200 Id.

201 See, e.g., Rainbow at 17-18.

202 See, e.g., Superstar at 62-64.

agreements would reduce their income and unreasonably disrupt their ability to secure costly programming, and would harm them financially.[203] In addition, the programmers contend that renegotiation of these contracts would pose a difficult and burdensome task, forcing costs to be passed on to consumers.[204] These commenters generally seek a grace period of several years to bring their existing agreements into compliance with our program access rules.[205] Finally, a number of commenters contend that a complainant should not be allowed to use a contract entered into before the Act or the effective date of the rules as a basis for comparison to determine whether a contract entered into after the Act violates Section 628.[206]

119. In contrast, commenters in favor of application of the program access provisions to existing contracts argue that Bowen and other cases on retroactivity are inapposite because the statute does not seek to recoup sums previously paid or attach liability for past events.[207] These commenters further argue that the fact that Congress expressly grandfathered in subsection 628(h) a narrow class of existing agreements mandates the conclusion that it intended to include all other contracts within coverage of the Act.[208] They contend that, given the long term nature of many programming agreements, any other interpretation of the applicability of Section 628 would not achieve the results Congress envisioned in a timely fashion.[209] Thus, with respect to the timing of implementation of the rules, some commenters argue that the statutory provisions should become effective immediately,[210] while others suggest that existing contracts be brought into compliance within a reasonable period of time.[211] Others suggest that existing contracts be brought into compliance through the complaint process.[212]

120. We affirm our tentative conclusion in the Notice "that any pricing policies or restrictions developed to implement Section 628 should not be applied retroactively to existing contracts."[213] Therefore, consistent with

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203 See, e.g., Liberty Media Reply at 32-34.

204 Id.

205 See, e.g., Group W at 9; UVI at 36.

206 See, e.g., Landmark at 11.

207 See, e.g., NRTC Reply at 19-20.

208 See, e.g., WCA at 29.

209 See, e.g., U.S. West at 5, n. 11.

210 See, e.g., NRTC at 32.

211 See, e.g., APPA Reply at 10.

212 See, e.g., DirecTv at 25-26.

the holdings in Bowen and similar cases that proscribe retroactive application of regulations absent clear congressional intent, the anti-discrimination rules adopted herein will not affect prices paid for past video programming services or penalize vendors for practices preceding passage of the Act. The Commission will, however, apply the rules adopted under Section 628 prospectively to all existing contracts, whether they were executed before or after the effective date of the rules.[214]

121. We believe that Congress would not have expressly grandfathered only a narrow class of contracts in Section 628(h) had it intended to generally exempt all existing contracts from the scope of the anti-discrimination requirements of Section 628.[215] Moreover, the long term nature of many programming agreements[216] would delay for several years the uniform implementation of rules intended to prohibit discriminatory practices within the video programming distribution industry.[217] Thus, we believe that Congress intended that rules promulgated to implement Section 628 should be applied prospectively to existing contracts, except as specifically provided for in subsection 628(h).

122. Given that renegotiation of existing affiliation agreements will have some disruptive effect on the market and on the entities involved,[218] we believe it is in the public interest to afford parties a reasonable period of time of 120 days after the effective date of the new rules in which to bring their agreements into compliance. After this date, a complainant may base a claim of discrimination on comparisons with contracts that predate passage of the Act, but the point of comparison for determining whether the contract rates offered to the complainant are reasonable should be the current rate paid by its competitor under the original terms of the competitor's contract or, if the contract has been renegotiated, the renegotiated terms.[219] In all cases, the reference point for comparing disparities among contracts must be the terms in effect at the time the complaint is filed rather than those in effect at some other time during the contract.[220]

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213 Notice at 201 (emphasis added).

214 Since this approach does not "alter [] the past legal consequences of past actions" or "change what the law was in the past," it does not constitute retroactive rulemaking. See Bowen, 488 U.S. at 219 (Scalia, J., concurring) (emphasis in original).

215 See, e.g., WCA at 29.

216 See Time Warner at 31-32.

217 See, e.g., U.S. West Reply at 5, n. 11.

218 See, e.g., Liberty Media Reply at 32-34.

219 Cf. Viacom at 34-35.

220 See, e.g., Time Warner Reply at 17 n.10.

F. Complaint and Enforcement Procedures Regarding Discrimination

123. As discussed earlier, we believe that a process derived from our §208 common carrier and §315(b) lowest unit charge complaint processes, modified to limit discovery procedures, will provide the most flexible and expeditious means of enforcing the antidiscrimination provisions of Section 628(c)(2)(B) through the adjudication process. Thus, we will adopt a system that promotes resolution of as many cases as possible on the basis of a complaint, answer and reply. Discovery will not be permitted as a matter of right in all cases, but only as needed on a case-by-case basis, as determined by the staff. Cases that require a relatively contained amount of discovery (limited to written interrogatories and document production) will be resolved at the staff level and shall be subject to review directly to the full Commission. Interlocutory review shall be permitted only after the staff has ruled on the merits. If, however, the staff determines that a case is particularly complex and will require extensive discovery, the parties will be so advised, and will be given the opportunity to resolve the dispute through ADR. If ADR is not selected or is unsuccessful, the case will be designated for an evidentiary hearing before an administrative law judge (ALJ). Interlocutory applications for review in such cases will be similarly limited, and any decision rendered by an ALJ shall be directly appealable to the Commission.

124. To minimize the number of complaints brought to the Commission, we will require that prior to filing a discrimination complaint, an aggrieved MVPD must first inform the programming vendor of its belief that discriminatory behavior has occurred. Such notice must be sufficiently detailed so that the vendor can determine the specific nature of the potential complaint. This will give the vendor an opportunity to resolve the dispute without involving the Commission. If the parties cannot reach resolution, the aggrieved MVPD should file its complaint along with evidence (an affidavit or copy of a certified letter) that the required notice to the vendor has been given.[221] Complaints failing to include such evidence will be dismissed. In addition, a one year statute of limitations, as set forth supra, will apply to discrimination complaints.

125. Complaint. When filing a complaint, the burden is on the complainant MVPD to make a prima facie showing that there is a difference between the terms, conditions or rates charged (or offered) to the complainant and its competitor by a satellite broadcast programming vendor or a vertically integrated satellite cable programming vendor that meets our attribution test. Thus, if the complaint is brought against a satellite cable programming vendor, the complaint must establish that the vendor meets the attribution standards adopted in this proceeding. In addition, the complainant must establish that it "competes" with the MVPD to which it seeks comparison, either on a national

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[221] At this time, rather than establishing a specific time period for the parties to attempt to resolve the dispute before an aggrieved MVPD may file a complaint, we will allow the aggrieved MVPD to determine the appropriate duration of negotiations. At a minimum, however, the MVPD must provide the potential defendant ten (10) days to respond to the notice, and allow a reasonable time thereafter for negotiations.

or local basis. Thus, the complainant must demonstrate that there is some overlap in actual or proposed service area with the "competing" distributor.

126. Next, the complaint must establish that the vendor has provided or offered different terms and conditions, or different prices, to the complainant and its competitor. The complainant may use a "rate card," some other generally available information, or the current contract between the defendant vendor and the complainant's competitor for comparison purposes to demonstrate a differential. If an aggrieved MVPD does not have access to a "rate card" or other comparative rate information (such as the contract with its competitor), it should request, by certified mail, such information from the vendor. If the vendor refuses to provide rate information pertaining to the MVPD's competitor, then the MVPD can file a complaint based on information and belief of an impermissible rate differential, supported by an affidavit,[222] along with a statement that the vendor refused to provide the necessary specific comparative information. The staff will then accept the complainant's rate allegations as true for purposes of its prima facie determination. In this way, we have addressed any concern raised in the comments about the MVPD's lack of access to information without requiring vendors to file "rate cards" or contracts at the Commission, because an aggrieved MVPD will be able to file a complaint and make a prima facie case whether it has access to its competitor's contract or not.

127. Answer. The vendor will be given thirty (30) days to file an answer challenging the complainant's allegations or presenting affirmative defenses that the difference in terms and conditions, or the difference between its price to the complainant and its price to the complainant's competitor, is justified by the four factors set forth in the statute for permitted differentials.[223] Alternatively, if the vendor believes that the complainant and the competitor are not sufficiently similar, and thus cannot be realistically compared, it can state its reasons for this conclusion (i.e., the competitor is a "charter" customer under a different rate structure), and submit an alternative contract for comparison with another more similarly situated MVPD that uses the same distribution technology as the competitor selected by the complainant.[224]

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[222] With respect to any adjudicatory process for Section 628, we will require that any supporting affidavit submitted be signed by an officer of the MVPD or vendor that is a party to the complaint.

[223] We note that several commenters argued that 20 days, as proposed in the Notice, was an insufficient period of time for a vendor to prepare a response. See, e.g., TCI at 41, Time Warner at 45. We believe that the thirty days allotted should be sufficient, especially given that vendors will have been given notice of the specific nature of the dispute by the aggrieved MVPD before the complaint is filed, and will thus have the opportunity to begin preparing a defense before the complaint is actually filed.

[224] As discussed earlier, the analysis of whether another MVPD is similarly situated will involve a consideration of geographic region (proximity), number of subscribers, date of entry of contract, type of service

128. Even if the defendant vendor chooses to demonstrate that the difference in its price to complainant and to complainant's competitor is justified by the factors set forth in the statute, without relying on an alternative contract providing a comparison to a similarly situated customer, the Commission may still need to reference a contract with a similarly situated customer to determine whether the magnitude of the differential is not discriminatory. For example, if the vendor argues that the price difference between the complainant and its competitor is due to the vendor's standard volume discounts, specific cost differences between the two customers, and certain "offering of service" factors (such as number of services purchased, channel positioning, penetration and marketing incentives), the Commission will have to determine whether each reason offered by the vendor for a differential is allowed under the statutory factors, and whether the precise magnitude of the price difference is justified by those factors.

129. The magnitude of a price differential due to standard volume discounts and specific cost differences may be ascertainable without the need to reference any other contract for comparisons. If the vendor submits written documentation that describes any standardized volume discounts routinely used by the vendor, we will accept such evidence in lieu of additional contracts to quantify the magnitude of a permissible differential. Similarly, if the vendor also offers standard discounts for the number of services purchased, channel positioning, penetration, and marketing commitments, then these too can be readily factored into the price calculation without reference to another contract, so long as the vendor submits written documentation that describes such standardized discounts or surcharges. If the vendor does not, however, use standard discounts, the vendor should submit, with its answer, a contract with a similarly situated customer in the same class of service as the complainant's competitor who has negotiated a price based on the same, or as closely similar as possible, terms as the complainant to support the vendor's argument that the price to complainant is fair. The vendor would argue that the price and/or discounts or surcharges given to this similarly situated customer apply to complainant, and therefore demonstrate that the price

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purchased, and specific terms related to distinct attributes of the purchasers or secondary transactions involved in the programming sale itself. For example, a SMATV operator serving portions of Indianapolis files a complaint against Vendor X alleging that the price charged to its cable competitor in Indianapolis is lower. Vendor X responds that it made the contract with the cable operator 10 years ago when it was a fledgling service, so the cable operator got a lower price that is no longer available to <u>any</u> new customers of Vendor X (i.e., such low price is now available neither to SMATV customers <u>nor</u> to cable customers). Moreover, the cable operator has agreed to provide various promotional services that the SMATV operator cannot or will not provide. Vendor X submits a contract that it signed last year with a nearby Bloomington cable operator with a similar number of subscribers as the SMATV operator which also does not include promotional services, arguing that this Bloomington cable operator is "similarly situated" to the Indianapolis SMATV operator, and thus provides the proper comparison.

offered/charged to complainant is not discriminatory.

130. Any contracts or proprietary information submitted by a vendor with its answer may be submitted pursuant to a request for confidentiality.[225] Vendors will not be permitted to redact any information contained in any contracts submitted for comparison purposes, because any terms will arguably affect the ultimate price, as well as the adequacy or appropriateness of the comparison. The complainant will be granted access to any such contracts or proprietary information submitted, provided it agrees to abide by the terms of a protective order that limits access to such information and limits the purposes for which any information obtained through the Section 628 complaint process may be used.[226] The defendant will be given an extra (5) days to submit a second, redacted version of its answer for the public file.

131. Reply. The complainant may file a reply within twenty (20) days after the answer is filed. The reply may challenge the justifications for the price differential relied upon by the vendor or any documentation submitted by the vendor with respect to standardized discounts, or may challenge any alternative comparison the vendor seeks to make as inappropriate because the contract submitted by the vendor is not with a customer who is similarly situated to the complainant. The complainant will have an additional five (5) days to file a second, redacted copy of the reply for the public record if it contains confidential or proprietary information.[227]

132. Staff Determination. After reviewing the complaint, answer and reply, the staff will issue what, for purposes of these proceedings, we will deem a prima facie determination.[228] If the complainant has not shown that there is a differential, or has not met the competitor or attribution standards, or if the vendor has completely justified both the reasons for and the magnitude of the differential to the satisfaction of the reviewing staff, the staff will find that the complainant has not made a prima facie case and will dismiss the complaint with prejudice. In order to dismiss the complaint, however, we emphasize that the staff must be persuaded not only that the vendor's reasons for the differential fall within the scope of the statutory factors as we have interpreted them, but also that the magnitude of the differential is justified.[229]

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[225] See 47 C.F.R. § 0.459(a).

[226] As in the case of exclusivity complaints, the complainant will be required to take reasonable steps to prevent unauthorized access to protected documents and information. See n. 103, supra.

[227] See 47 C.F.R. §0.459(a).

[228] Motions to dismiss, motions for summary judgment, or any additional pleadings will not be considered except in extraordinary circumstances or unless requested by the staff. We intend to keep pleadings to a minimum to comply with the statutory directive for an expedited adjudicatory process.

[229] For example, a vendor can demonstrate that the magnitude of the

133. In an effort to conserve Commission resources and avoid the need for discovery and protracted adjudication aimed solely at resolution of accounting issues, we have determined that it is in the public interest to assign a somewhat higher burden of proof for making a prima facie case on a complainant if the complaint is based on a de minimis price differential. In those cases in which the differential between the complainant's price and that of its competitor is equal to or less than five cents per subscriber or five percent, whichever is larger, we will not require the vendor to justify the magnitude of the differential so long as it provides sufficient reasons that are justified by the statutory factors for a difference in price. Any defendant in a discrimination case relying on this defense must specifically raise it in its answer, stating that the price differential is 5 cents or 5 percent, and identify the statutory factors that it relies on to permit such a differential. We emphasize that this approach does not establish any form of per se zone of reasonableness in pricing, nor does it allow any vendor to automatically charge an MVPD a surcharge of five cents per subscriber or five percent over its competitor. In any discrimination complaint case, the vendor must always demonstrate to the Commission's satisfaction that it has sufficient reasons that are justifiable under the statutory factors to support a de minimis price difference.[230]

134. If the staff determines that the complainant has established a prima facie case, and no further information is necessary to determine the fair or reasonable price, the staff will issue an order ruling in favor of the complainant, with appropriate remedies.[231] In most cases, we believe that the appropriate remedy will be to order the vendor to revise its contract or offer to the complainant a price or contract term in accordance with the Commission's findings. However, as discussed previously, the statute provides broad authority to the Commission to order additional remedies or impose sanctions for violations of Section 628, which will be used in appropriate circumstances.

135. Discovery. If the staff determines that the complainant has established a prima facie case, and further information is necessary to resolve

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differential is permissible if it has quantified its volume discounts or has applied other quantifiable standard discounts or surcharges, and can show through simple arithmetic that applying these discounts or surcharges results in the price charged or offered to the complainant.

[230] In this way, so long as the vendor provides sufficient reasons to satisfy the reviewing staff that a de minimis price differential is justified, we can conserve Commission resources by not also requiring that the vendor produce and support detailed, precise accounting information.

[231] For example, the staff would issue such an order if it determined, on the basis of the pleadings, that the vendor had improperly applied a particular discount or surcharge, or had relied on a discount or surcharge that was not justifiable under the statutory factors.

the complaint (e.g., additional information is necessary to quantify a permissible differential), the staff will issue a ruling to that effect. The staff will then determine what additional information is necessary, and will develop a discovery process and timetable to resolve the dispute expeditiously. Given the nature of the programming distribution marketplace, and the wide range of sales practices, we do not believe that it would be efficient or advisable to mandate uniform discovery processes herein for Section 628 complaints. Instead, we will provide the staff with flexibility to assess each case and order discovery accordingly. In some cases, we expect that the reviewing staff will itself conduct discovery by issuing appropriate letters of inquiry or require that specific documents be produced. The staff will determine whether it is necessary to file discovery materials with the Commission, or whether they should be provided only to the opposing party. The staff will order that any documents or answers to such inquiries will be submitted to the Commission and to the complainant pursuant to a protective order within a specified time period.

136. If the staff cannot readily identify what information is needed, it can direct the parties to submit discovery requests and supporting memoranda within a specified time period. The staff will then schedule a status conference to resolve discovery disputes and establish a timetable for compliance. As in Section 208 common carrier complaint proceedings, the staff will be authorized to issue oral rulings at the status conference which will be confirmed in writing to the parties. Discovery will be limited to issues raised by the vendor's defenses. Any information exchanged through discovery will also be subject to a protective order.

137. After the conclusion of discovery, the staff will require the parties to submit briefs, together with proposed findings of fact, conclusions of law and proposed remedies at a specified date. Reply briefs should be filed within the following fifteen (15) days. The parties will be given an additional five (5) days in which to file redacted copies of briefs and reply briefs for the public record when they contain confidential or proprietary information. The staff is expected to act expeditiously. After a ruling on the merits, either party may file an application for review of the staff's determinations directly to the Commission. Such ruling will include a timetable for compliance, and will be effective upon release.[232] In the absence of a stay, any relief or remedy imposed in the order will remain in effect pending review. Stays will be routinely granted.

138. Referral to ALJ. If the staff determines that the complainant has established a prima facie case, and that extensive discovery will probably be required to resolve the complaint, it will so advise the parties in writing. If both parties agree, they may elect to resolve the dispute through ADR. If the parties do not agree to ADR, the staff will designate the complaint for hearing before an ALJ. The ALJs are expected to resolve such cases expeditiously, and should promptly hold a status conference to establish timetables for discovery, hearing (if necessary), and submission of briefs and proposed findings of fact and conclusions of law. A ruling on the merits by

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232 See 47 C.F.R. Section 1.102(b).

the ALJ may be appealed directly to the Commission. Such ruling will be effective upon release.[233] In the absence of a stay, any relief or remedy imposed on the order will remain in effect pending appeal. Stays will not be routinely granted.

G. Complaints Alleging Non-price Discrimination

139. Complaint. When filing a complaint, the burden is on the complainant to make a prima facie showing that a satellite broadcast programming vendor or a vertically integrated satellite cable programming vendor that meets the attribution standards outlined herein has engaged in some form of non-price discrimination, such as an unreasonable refusal to sell its programming to the complainant, between the complainant and another MVPD competitor. The complaint must include proof that the complainant has notified the vendor of its potential claim, and must be supported by appropriate documentation or an affidavit setting forth the basis for the claim that the vendor has engaged in a form of non-price discrimination. The complaint should also specify the relief requested. A one-year statute of limitations, as set forth supra, will apply to non-price discrimination complaints.

140. Answer and Reply. The vendor will have thirty (30) days in which to respond to the complaint. To avoid a decision in favor of the complainant, the vendor must establish that it has not engaged in discriminatory behavior, such as refusing to sell programming to the complainant for any discriminatory reasons, but that it has not sold its programming to the complainant on the same terms and conditions as the complainant's competitor for legitimate business reasons. For example, a refusal to sell may be based on a legitimate impasse in negotiations. We emphasize, however, that a negotiating impasse will not be regarded as legitimate if it is due to the vendor's adherence to a discriminatory price or condition of sale.[234] The complainant will have twenty (20) days following the answer in which to file a reply.

141. Staff Determination. The staff is expected to issue a ruling on the merits expeditiously. Such ruling may be oral or written; any oral ruling will later be released in writing. We do not expect that such cases will present the need for discovery.[235] If appropriate, the staff will order the parties to

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[233] But see 47 C.F.R. Section 1.276(a)(1), in which an initial decision by an administrative law judge does not become effective if appealed until after Commission review. For program access complaint procedures, however, we have determined that the ALJ's decision on the merits should include a timetable for compliance to provide any relief ordered, and we have determined that the order should become effective upon release and remain in effect pending appeal.

[234] If a complaint is based on a refusal to sell that is due strictly to a disagreement in price, however, we will evaluate the complaint under the price discrimination process outlined above using the vendor's offer as the basis for necessary comparisons. We will not permit complainants to use this process for "unreasonable refusals to sell" in addition to, or as a substitute for, the discrimination complaint process.

attempt to negotiate a sale. If the parties cannot resolve their differences within a specified time period, rather than engage in discovery or protracted adjudication, the staff will hold a status conference with the parties to determine whether the failure to reach an agreement is the result of a legitimate negotiating impasse. If, however, the staff determines that the vendor's refusal to sell to complainant on non-discriminatory terms and conditions is unreasonable, it will issue an order with appropriate remedies and sanctions. An application for the review of any staff ruling on the merits may be filed directly by either party to the Commission. Such ruling will include a timetable for compliance and become effective upon release.[236] In the absence of a stay, any relief or remedies imposed in the order will remain in effect pending review. Stays will not be routinely granted.

VIII. PROHIBITIONS AGAINST UNDUE OR IMPROPER INFLUENCE

Background

142. As indicated above, the Commission is directed to prescribe regulations to specify particular conduct that is prohibited by Section 628(b) in three specific areas. The first of these relates to the exercise of certain types of "undue influence." Specifically, the Commission must:

> establish effective safeguards to prevent a cable operator which has an attributable interest in a satellite cable programming vendor or a satellite broadcast programming vendor from unduly or improperly influencing the decision of such vendor to sell, or the prices, terms, and conditions of sale of, satellite cable programming or satellite broadcast programming to any unaffiliated multichannel video programming distributor.

143. In the Notice we sought comment on the scope of activities or practices that we should consider "undue influence." We also asked for comment on standards to apply in distinguishing practices that would constitute undue influence from other actions that may occur during the normal course of negotiations over prices and conditions of programming sales.

Comments

144. Few parties comment on the appropriate definition of undue influence pursuant to this provision. In general, non-cable commenters propose that undue influence should be presumed if particular discriminatory conduct is alleged,[237] while cable commenters assert that the Commission should require

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[235] If, however, discovery is required, the staff may proceed with discovery as allowed in a price discrimination case. Moreover, the staff may designate a case for hearing before an ALJ in particularly complex cases.

[236] See 47 C.F.R. §1.102(b).

[237] See, e.g., DirecTv at 19-20, WJB at 13.

particular proof that undue influence occurred.[238]

Discussion

145. Based on information presented in the record, we conclude that the concept of undue influence between affiliated firms is closely linked with discriminatory practices and exclusive contracting, the direct regulation of which is to be undertaken pursuant Sections 628(c)(2)(B), (C), and (D) based on externally ascertainable pricing and contracting information. Section 628(c)(2)(A) can play a supporting role where information is available (such as might come from an internal "whistleblower") that evidences "undue influence" between affiliated firms to initiate or maintain anticompetitive discriminatory pricing, contracting, or product withholding. Although such conduct may be difficult for the Commission or complainants to establish, its regulation provides a useful support for direct discrimination and contracting regulation. A prohibition against such conduct will accordingly be incorporated into the rules.[239]

146. Complaint and enforcement procedures. As in the case of both discrimination and exclusivity complaints, we will require that any complainant must first notify the cable operator, vertically integrated satellite cable programming vendor, or satellite broadcast programming vendor of its belief that said party has engaged in prohibited acts or practices. Such notice must provide sufficient specificity so that the cable operator or programming vendor can ascertain the precise nature of the dispute. If the parties cannot resolve the dispute without involving the Commission, the complainant may file a complaint along with evidence (an affidavit or copy of a certified letter) that the required notice has been given.[240] Failure to include such evidence will be grounds for immediate dismissal of the complaint.

147. As with all other Section 628 cases, we seek to dispose of as many complaints as possible on the basis of a complaint, answer, and reply.

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238 See, e.g., Superstar at 42-44, UVI at 21, TCI at 36, Time Warner at 15-17.

239 We note that the suggestions of the Attorneys General, which are detailed in Appendix C, are either covered by our other regulations regarding discrimination or refusals to deal, or are not within the scope of 628(c)(2)(A) because they do not involve vertical relationships. We also note that APPA provides two examples of conduct that, allegedly, was caused by the undue influence of a vertically integrated cable operator that are more appropriately addressed with reference to the statute's exclusivity provisions. See APPA at 4-6.

240 At this time, rather than establishing a specific time period for the parties to attempt to resolve the dispute before an aggrieved MVPD may file a complaint, we will allow the aggrieved MVPD to determine the appropriate duration of negotiations. At a minimum, however, the MVPD must provide the potential defendant ten (10) days to respond to the notice, and allow a reasonable time thereafter for negotiations.

Discovery will not be permitted as a matter of right, but on a case-by-case basis as deemed appropriate by the reviewing staff. Interlocutory applications for review shall be permitted only after the staff has issued a ruling on the merits. The ex parte rules regarding restricted proceedings will be applied.

148. Complaint. When filing a complaint, the burden of proof will be on the MVPD to establish a prima facie showing that the defendant has engaged in conduct prohibited by Section 628(c)(2)(A). The complainant must show that the defendant is a cable operator, a satellite broadcast programming vendor, or a vertically integrated satellite cable programming vendor that meets the attribution standards established herein. The complaint must be supported by documentary evidence of the alleged violation, or by an affidavit (signed by an officer of the complaining MVPD) setting forth the basis for the complainant's allegations. A one-year statute of limitations, as set forth supra, will apply to undue influence complaints. Finally, the complaint should specify the relief requested.

149. Answer and Reply. The defendant will be given thirty (30) days to file an answer responding to the complainant's allegations. The answer should be supported by documentary evidence, or an affidavit (signed by an officer of the defendant), that refutes the complainant's allegations or supports any affirmative defenses the defendant may raise. The complainant will be given twenty (20) days to respond to the defendant's answer.

150. Staff Determination. After reviewing the complaint, answer and reply, the staff will make what, for the purposes of these proceedings, we will deem a prima facie determination.[241] If the complainant has not made a prima facie case of a violation the complaint will be dismissed. If the staff determines that the complainant has made a prima facie case of a violation, the staff will so rule, and will determine whether it can grant relief on the basis of the existing record. If the record is not sufficient to resolve the complaint, the staff will determine and outline the appropriate procedures for discovery.

151. Discovery. The staff will determine what additional information is necessary to resolve the complaint, and will develop a discovery process and timetable to resolve the dispute expeditiously. Wherever possible, to avoid discovery disputes and arguments pertaining to relevance, the staff will itself conduct discovery by issuing appropriate letters of inquiry or requiring that specific documents be produced. The staff will determine whether the materials ordered to be produced to the opposing party should also be filed with the Commission. The staff will order that any documents or answers to such inquiries will be submitted to the Commission and to the opposing party pursuant to a protective order within a specified time period. If the staff cannot readily determine what information is needed, it can direct the parties to submit discovery requests and supporting memoranda within a specified time period. The staff will then schedule a status conference to resolve discovery

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[241] As in the case of discrimination and exclusivity complaints, motions to dismiss and motions for summary judgment will not be considered. We intend to keep pleadings to a minimum to comply with the statutory directive for an expedited adjudicatory process.

disputes and establish a timetable for compliance.[242] The staff is authorized to issue oral rulings at the status conference which will be confirmed in writing to the parties. Any information exchanged through discovery will be subject to a protective order.

152. Upon conclusion of discovery, the staff will direct the parties to submit briefs, together with proposed findings of fact, conclusions of law and proposed remedies on a specified date. Reply briefs should be filed within the following fifteen (15) days. The parties will be given an additional five (5) days in which to file redacted copies of briefs and reply briefs for the public record when they contain confidential or proprietary information from material that is subject to a protective order. After a ruling on the merits, either party may file an application for review of the staff's determinations directly to the Commission. Such ruling will include a timetable for compliance, and will become effective upon release.[243] In the absence of a stay, any relief or remedies imposed therein shall remain in effect pending review. Stays will not be routinely granted.

153. Referral to ALJ. If the staff determines that the complainant has established a prima facie case, and that extensive discovery will probably be required to resolve the complaint, it will so advise the parties in writing. If both parties agree, they may elect to resolve the dispute through ADR. If the parties do not agree to ADR, the staff may refer the complaint to an ALJ for an administrative hearing. The ALJs are expected to resolve such cases expeditiously, and should hold an immediate status conference to establish timetables for discovery, hearing, and submission of briefs and proposed findings of fact and conclusions of law. Interlocutory appeals shall be permitted only after a ruling on the merits. A ruling on the merits by the ALJ must be appealed directly to the Commission. Such ruling will include a timetable for compliance and will become effective upon release. In the absence of a stay, any relief or remedies imposed therein will remain in effect pending appeal.

IX. FRIVOLOUS COMPLAINTS

154. As required by Section 628 (f)(3), the Notice made certain proposals with respect to penalties for filing frivolous complaints. Specifically, we proposed to enforce a prohibition against filing frivolous complaints by assessing monetary forfeitures, and sought comment on the relationship between the penalties provided for in the Cable Act and the general penalties contained in Section 503 of the Communications Act as well as comments on guidelines to determine forfeiture amounts. We also requested comment on the factors we

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[242] Additional pleadings, such as responses to opponent's supporting memoranda, beyond those specifically requested by the reviewing staff will not be considered. Parties will have sufficient opportunity to make any necessary additional arguments at any status conference. Again, we intend to keep pleadings to the minimum necessary to resolve the dispute expeditiously.

[243] See 47 C.F.R. §1.102(b).

should consider in determining whether a complaint is frivolous. In response to the Notice's proposals, programming vendors assert that penalties against frivolous complaints are important and suggest that Federal Rule of Civil Procedure 11 be used as a model.[244] They state that a minimum forfeiture should be sufficiently high to discourage frivolous complaints. MVPDs, on the other hand, caution the Commission to "tread lightly" with respect to this issue to avoid deterring legitimate complaints. These parties argue that the complaint should not be deemed frivolous if it is dismissed based on evidence produced by the programmer that the complainant had no way of knowing because such evidence was under the control of the programmer.[245] NRTC argues that no complaint should be found frivolous if there is any difference in price, terms and conditions of service.[246]

155. The regulations adopted in this area seek to avoid constraining MVPDs from filing legitimate complaints while affording the statutory protection from frivolous complaints promised to vendors. Although Federal Rule of Civil Procedure 11 offers some useful regulatory language,[247] its provisions are more complex than analogous Commission rules and thus we believe it is not a totally appropriate model. We also reject NRTC's assertion that a complaint is not frivolous if it is based on a difference in price, terms and conditions because this analysis ignores the second part of a prima facie claim, namely that a differential is unjustified. Accordingly, pursuant to Congressional directive, we adopt regulations prohibiting the filing of frivolous complaints alleging violation of any provision of Section 628. Our regulations will also require that all complaints alleging violations of Section 628 must be accompanied by an affidavit signed by an authorized officer or agent of the complainant. To enforce the prohibition against filing frivolous complaints, we will assess monetary forfeitures in accordance with Section 503 of the Communications Act and our forfeiture regulations and policies. For purposes of Section 503(b)(5), one finding that a complainant has filed a frivolous complaint under any provision of Section 628 will be sufficient to fulfill the citation requirements of the forfeiture provisions.

156. With respect to the type of complaints that the Commission will deem frivolous, we believe that complaints filed without any effort to ascertain or review the underlying facts should be considered frivolous. We expect that the requirement adopted herein that complaints be accompanied by affidavit should assure that such complaints are based on specific and substantiated facts. When this is not the case, the complainant will be liable for sanctions for violating our rule against frivolous complaints. Similarly,

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[244] See, e.g., E! at 11; Liberty Media at 65; Superstar at 67; UVI at 41; and EMI at 13.

[245] DirecTv at 31-32.

[246] UVI opposed this approach, stating that complaints containing only general and unsupported allegations should be dismissed. See UVI Reply at 5.

[247] For example, the requirement of signed affidavit is modeled after a similar requirement in Rule 11.

complainants will be liable for sanctions for filing a frivolous complaint when that complaint is based on arguments that have been specifically rejected by the Commission in other proceedings, or for filing a complaint that has no plausible basis for relief. We agree with DirecTv, however, that a complaint should not be found frivolous if dismissal of the complaint is based solely on evidence that the complainant had no way of knowing before it was produced by the programmer in the complaint process. We expect that further standards with respect to frivolous complaints will develop as specific cases are adjudicated.

X. ANNUAL REPORT TO CONGRESS

157. Section 628(g) of the 1992 Cable Act directs the Commission to annually report to Congress on the status of competition in the video programming marketplace. The Commission must issue its first report within 18 months of promulgating program access regulations. In the Notice, we proposed that the report should include, at a minimum, an analysis of Section 628 complaints filed with the Commission, as well as generally available industry information regarding the status of competition in the satellite cable and satellite broadcast programming marketplace.[248] We also sought comment on additional information to be collected, including data regarding (1) the number of independently owned cable operators and programming distributors; (2) the degree of vertical integration between cable operators and programming distributors; (3) the penetration or availability of programming to competing multichannel services; and (4) the levels of pricing differentials for programming, including the range and average of volume-related discounts and other permissible differentials.[249] Of the very few commenters that address the content of our annual reports, some argue that we should require an annual submission from cable programmers detailing specific pricing data and include this information in our report to Congress. Other commenters, however, are concerned that submission of specific price data would be detrimental to competition.

158. We intend to include in our annual report to Congress the type of information specified in categories (1), (2) and (3) above. Such data will be readily available through existing industry publications and through data submitted during the complaint process, and we therefore do not intend to impose reporting requirements on programmers or distributors. We believe that annual analysis of this information will enable us to closely follow the competitive development of the video programming industry. While data of the type specified in category (4) would also be informative, we are concerned that

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[248] The Notice also sought comment on a process for collecting data necessary to facilitate our resolution of programming access complaints, as directed by Section 628(f)(2). We note that our decisions regarding the enforcement processes for alleged instances of discrimination, exclusivity, and unfair practices, will address the types of information that we will require to resolve complaints, and how to maintain the confidentiality of proprietary information.

[249] Notice at 205.

disclosure of such data, even in aggregate form, could hinder competition in the industry. We will, however, summarize our experience with the complaint process in our reports to Congress, and we will include the total number of complaints resolved and will report on the general nature of those complaints. Thus, our reports to Congress will also include public or non-protected information from the complaints, as well as a general summary of data without divulging proprietary information. In addition, although we have not adopted a specific program access reporting requirement, we may subsequently request program access information as part of a general collection of information commenced with respect to other requirements of the 1992 Cable Act.

XI. CONCLUSION

159. In this Report and Order, we adopt rules to implement the new Section 628 of the Communications Act regarding program access. After evaluating the record in this proceeding, we are cognizant that even as distributors gain access to programming services, their ability to enhance the diversity of programming available to the public will still depend upon their opportunities to purchase programming at nondiscriminatory prices and terms. We also recognize testimony in the legislative history of the 1992 Cable Act that caused Congress to conclude that vertically integrated program suppliers have the incentive and ability to discriminate and favor their affiliated cable operators over other multichannel programming distributors. Therefore, we seek to adopt implementing rules for Section 628 that will prohibit and remedy such problems, thus fulfilling the congressional intent to prohibit unfair or anticompetitive actions without restraining the amount of multichannel programming available by precluding legitimate business practices that enhance competition and create programming diversity. Finally, in response to the Congressional mandate to develop an adjudicatory process for implementing the provisions of Section 628, we establish procedures tailored to specific classes of complaints in order to resolve such matters as expeditiously as possible.

XII. ADMINISTRATIVE MATTERS

A. Final Regulatory Flexibility Analysis

160. The Final Regulatory Flexibility Analysis is attached as Appendix D.

B. Paperwork Reduction Act Statement

161. The decision in this proceeding has been analyzed with respect to the Paperwork Reduction Act of 1980, and has been found to impose new or modified requirements or burdens upon the public. Implementation of any new or modified requirements will be subject to approval by the Office of Management and Budget as prescribed by the Act.

C. Ordering Clauses

162. Accordingly, IT IS ORDERED that, pursuant to Sections 2(a), 4(i), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 152(a),

154(i), and 303(r), Part 76 of the Commission's Rules, 47 C.F.R. Part 76, IS AMENDED as set forth in Appendix E, below, effective July 16, 1993.

163. IT IS FURTHER ORDERED that MM Docket No. 92-265 will remain open until such time as the remaining issues relating to Section 12 of the Cable Act are resolved.

164. For further information in this proceeding, contact James Coltharp, Mass Media Bureau, (202) 632-6302; Diane Hofbauer, Office of the General Counsel, (202) 632-6990; Jane Halprin, Mass Media Bureau, (202) 632-7792; or Rosalee Chiara, Common Carrier Bureau, (202) 634-1781.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A: Section 19 of the 1992 Cable Act

SEC. 19. DEVELOPMENT OF COMPETITION AND DIVERSITY IN VIDEO PROGRAMMING DISTRIBUTION.

Part III of title VI of the Communications Act of 1934 is amended by inserting after section 627 (47 U.S.C. 547) the following new section:

"SEC. 628. DEVELOPMENT OF COMPETITION AND DIVERSITY IN VIDEO PROGRAMMING DISTRIBUTION.

"(a) Purpose.--The purpose of this section is to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market, to increase the availability of satellite cable programming and satellite broadcast programming to persons in rural and other areas not currently able to receive such programming, and to spur the development of communications technologies.

"(b) Prohibition.--It shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.

"(c) Regulations Required.--

"(1) Proceeding required.--Within 180 days after the date of enactment of this section, the Commission shall, in order to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market and the continuing development of communications technologies, prescribe regulations to specify particular conduct that is prohibited by subsection (b).

"(2) Minimum contents of regulations.--The regulations to be promulgated under this section shall--

"(A) establish effective safeguards to prevent a cable operator which has an attributable interest in a satellite cable programming vendor or a satellite broadcast programming vendor from unduly or improperly influencing the decision of such vendor to sell, or the prices, terms, and conditions of sale of, satellite cable programming or satellite broadcast programming to any unaffiliated multichannel video programming distributor;

"(B) prohibit discrimination by a satellite cable programming vendor in which a cable operator has an attributable interest or by a satellite broadcast programming vendor in the prices, terms, and conditions of sale or delivery of satellite cable programming or satellite broadcast programming among or between cable systems, cable operators, or other multichannel video programming distributors, or their agents or buying groups; except that such a satellite cable programming vendor in which a cable operator has an attributable interest or such a satellite broadcast programming vendor shall not be prohibited from--

"(i) imposing reasonable requirements for creditworthiness, offering of service, and financial stability and standards regarding character and technical quality;

"(ii) establishing different prices, terms, and conditions to take into account actual and reasonable differences in the cost of creation, sale, delivery, or transmission of satellite cable programming or satellite broadcast programming;

"(iii) establishing different prices, terms, and conditions which take into account economies of scale, cost savings, or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor; or

"(iv) entering into an exclusive contract that is permitted under subparagraph (D);

"(C) prohibit practices, understandings, arrangements, and activities, including exclusive contracts for satellite cable programming or satellite broadcast programming between a cable operator and a satellite cable programming vendor or satellite broadcast programming vendor, that prevent a multichannel video programming distributor from obtaining such programming from any satellite cable programming vendor in which a cable operator has an attributable interest or any satellite broadcast programming vendor in which a cable operator has an attributable interest for distribution to persons in areas not served by a cable operator as of the date of enactment of this section; and

"(D) with respect to distribution to persons in areas served by a cable operator, prohibit exclusive contracts for satellite cable programming or satellite broadcast programming between a cable operator and a satellite cable programming vendor in which a cable operator has an attributable interest or a satellite broadcast programming vendor in which a cable operator has an attributable interest, unless the Commission determines (in accordance with paragraph (4)) that such contract is in the public interest.

"(3) Limitations.--

"(A) Geographic limitations.--Nothing in this section shall require any person who is engaged in the national or regional distribution of video programming to make such programming available in any geographic area beyond which such programming has been authorized or licensed for distribution.

"(B) Applicability to satellite retransmissions.--Nothing in this section shall apply (i) to the signal of any broadcast affiliate of a national television network or other television signal that is retransmitted by satellite but that is not satellite broadcast programming, or (ii) to any internal satellite communication of any broadcast network or cable network that is not satellite broadcast programming.

"(4) Public interest determinations on exclusive contracts.--In determining whether an exclusive contract is in the public interest for purposes of paragraph (2)(D), the Commission shall consider each of the following factors with respect to the effect of such contract on the distribution of video programming in areas that are served by a cable

operator:

"(A) the effect of such exclusive contract on the development of competition in local and national multichannel video programming distribution markets;

"(B) the effect of such exclusive contract on competition from multichannel video programming distribution technologies other than cable;

"(C) the effect of such exclusive contract on the attraction of capital investment in the production and distribution of new satellite cable programming;

"(D) the effect of such exclusive contract on diversity of programming in the multichannel video programming distribution market; and

"(E) the duration of the exclusive contract.

"(5) Sunset provision.--The prohibition required by paragraph (2)(D) shall cease to be effective 10 years after the date of enactment of this section, unless the Commission finds, in a proceeding conducted during the last year of such 10-year period, that such prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming.

"(d) Adjudicatory Proceeding.--Any multichannel video programming distributor aggrieved by conduct that it alleges constitutes a violation of subsection (b), or the regulations of the Commission under subsection (c), may commence an adjudicatory proceeding at the Commission.

"(e) Remedies for Violations.--

"(1) Remedies authorized.--Upon completion of such adjudicatory proceeding, the Commission shall have the power to order appropriate remedies, including, if necessary, the power to establish prices, terms, and conditions of sale of programming to the aggrieved multichannel video programming distributor.

"(2) Additional remedies.--The remedies provided in paragraph (1) are in addition to and not in lieu of the remedies available under title V or any other provision of this Act.

"(f) Procedures.--The Commission shall prescribe regulations to implement this section. The Commission's regulations shall--

"(1) provide for an expedited review of any complaints made pursuant to this section;

"(2) establish procedures for the Commission to collect such data, including the right to obtain copies of all contracts and documents reflecting arrangements and understandings alleged to violate this section, as the Commission requires to carry out this section; and

"(3) provide for penalties to be assessed against any person filing a frivolous complaint pursuant to this section.

"(g) Reports.--The Commission shall, beginning not later than 18 months after promulgation of the regulations required by subsection (c), annually report to Congress on the status of competition in the market for the delivery of video programming.

"(h) Exemptions for Prior Contracts.--

"(1) In general.--Nothing in this section shall affect any contract that grants exclusive distribution rights to any person with respect to satellite cable programming and that was entered into on or before June 1, 1990, except that the provisions of subsection (c)(2)(C) shall apply

for distribution to persons in areas not served by a cable operator.

"(2) Limitation on renewals.--A contract that was entered into on or before June 1, 1990, but that is renewed or extended after the date of enactment of this section shall not be exempt under paragraph (1).

"(i) Definitions.--As used in this section:

"(1) The term 'satellite cable programming' has the meaning provided under section 705 of this Act, except that such term does not include satellite broadcast programming.

"(2) The term 'satellite cable programming vendor' means a person engaged in the production, creation, or wholesale distribution for sale of satellite cable programming, but does not include a satellite broadcast programming vendor.

"(3) The term 'satellite broadcast programming' means broadcast video programming when such programming is retransmitted by satellite and the entity retransmitting such programming is not the broadcaster or an entity performing such retransmission on behalf of and with the specific consent of the broadcaster.

"(4) The term 'satellite broadcast programming vendor' means a fixed service satellite carrier that provides service pursuant to section 119 of title 17, United States Code, with respect to satellite broadcast programming.".

APPENDIX B: List of Commenters in MM Docket No. 92-265

Initial Comments

1. Advanced Communications Corp.
2. Affiliated Regional Communications, Ltd.
3. American Public Power Association
4. Ameritech OPerating Companies
5. Arts & Entertainment Network
6. Attorneys General of Texas, Maryland, Ohio, and Pennsylvania
7. Bell Atlantic and Pacific Companies
8. BellSouth Telecommunications, Inc.
9. CableAmerica Corporation
10. Coalition of Concerned Wireless Cable Operators
11. Coalition of Small System Operators
12. Community Antenna Television Association
13. Consumer Satellite Systems, Inc.
14. Continental Cablevision, Inc.
15. DirecTv, Inc.
16. Discovery Communications, Inc.
17. E! Entertainment Television, Inc.
18. EMI Communications Corp.
19. Group W Satellite Communications
20. International Family Entertainment, Inc.
21. Landmark Communications, Inc.
22. Liberty Cable Company, Inc.
23. Liberty Media Corp.
24. Lifetime Television
25. Madison Communications, Inc.
26. Motion Picture Association of America, Inc.
27. National Cable Television Association, Inc.
28. National Private Cable Association et al.
29. National Rural Telecommunications Cooperative and the Consumer Federation of America
30. National Satellite Programming Network, Inc.
31. National Telephone Cooperative Association
32. NYNEX Telephone Companies
33. Primetime 24
34. Rainbow Programming Holdings, Inc.
35. Rochester Telephone Corporation
36. Superstar Connection
37. Tele-Communications, Inc.
38. Telecommunications Research and Action Center & the Washington Area Citizens Coalition Interested in Viewers' Constitutional Rights
39. Time Warner Entertainment Company, L.P.
40. Turner Broadcasting System, Inc.
41. United States Satellite Broadcasting Company, Inc.
42. United States Telephone Association
43. United Video, Inc.
44. U.S. West Communications, Inc.
45. Viacom International, Inc.
46. WJB-TV Ft. Pierce Ltd. Partnership

47. Wireless Cable Association International, Inc.

Reply Comments

1. Advanced Communications Corp.
2. American Public Power Association
3. Bell Atlantic
4. Cablevision Industries Corp./Comcast Cable Communications
5. Community Antenna Television Association
6. Consumer Satellite Systems, Inc.
7. Cross Country Telecommunications, Inc.
8. Directv, Inc.
9. Discovery Communications, Inc.
10. EMI Communications Corp.
11. ESPN
12. GTE Service Corporation
13. International Family Entertainment, Inc.
14. Landmark Communications, Inc.
15. Liberty Cable Company, Inc.
16. Liberty Media Corp.
17. City of Manitowoc, WI
18. Motion Picture Association of America, Inc.
19. National Association of Telecommunications Officers and Advisors/National League of Cities/United States Conference of Mayors/National Association of Counties
20. National Cable Television Association, Inc.
21. National Rural Telecommunications Cooperative/Consumer Federation of America
22. National Satellite Programming Network
23. People's Cable
24. People's Choice TV Partners
25. Prime Ticket Network
26. Provo Cable Company
27. Sammons Communications, Inc.
28. Satellite Broadcasting and Communications Association of America
29. Souris River Telecommunications Cooperative
30. Southland Cablevision, Inc.
31. Superstar Connection
32. Tele-Communications, Inc.
33. Time Warner Entertainment Company, L.P.
34. Times Mirror Cable Television
35. Turner Broadcasting System, Inc.
36. United States Telephone Association
37. United Video, Inc.
38. U.S. West Communications, Inc.
39. Viacom International, Inc.
40. WJB-TV Fort Pierce, L.P.
41. Wireless Cable Association International, Inc.

APPENDIX C SUMMARY OF COMMENTS

Outline

I. General Program Access Issues
- A. Scope of Section 628
- B. Harm
- C. Undue Influence

II. Discrimination
- A. Definition of Discrimination
- B. Vertical Integration as Standard to Determine Discrimination
- C. Options Proposed in the Notice Regarding Discrimination
- D. Justifying Factors for Price Differences Under Section 628
- E. Other Pricing Factors Suggested by Comments
- F. Buying Groups
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III. Exclusive Contracts
- A. Section 628(c)(2)(C)
- B. Section 628(c)(2)(D)

IV. Enforcement
- A. Process
- B. Burden of Proof
- C. Discovery
- D. Remedies
- E. Frivolous Complaints
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V. Application of Anti-Discrimination Provisions to Existing Contracts

VI. Other Issues
- A. Data Collection
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- C. Geographic Areas

I. General Program Access Issues

A. Scope of Section 628

1. General Comments

1. Commenters are divided as to whether the Notice properly characterized the provisions of Section 628 of the 1992 Act. A number of commenters assert that the Notice accurately reflected Congressional intent with respect to the parties and practices to be covered by the statute and correctly identified all relevant issues.[1] For example, APPA submits that the

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[1] See, e.g., APPA at 6; NCTA at 4; NCTA Reply at 7; Superstar Reply at 1-

Notice "is an extraordinarily comprehensive and thoughtful document that identifies the key relevant issues and reduces numerous highly complex issues to manageable proportions."[2] Other commenters, however, contend that the Notice failed to acknowledge the findings of Congress with respect to discrimination in program distribution by the cable industry, and that the Notice evidenced the Commission's intention to go beyond the authority granted it by Congress in the 1992 Act.[3] For example, CableAmerica argues that the Notice proposed "to introduce unauthorized and unwarranted complexities" into Section 628.[4] Manitowoc contends that the Notice proposed rules that would "leave essentially unchanged the anticompetitive cable industry practices Congress intended to eradicate."[5] NRTC asserts that the Notice was "inconsistent with clear Congressional intent, contrary to the plain language of the statute, and incompatible with the public interest."[6] WCA submits that while Section 628 is not particularly clear and poses the Commission with a difficult task, the Commission "seems so preoccupied with resolving every real or imagined issue... that it has lost sight of Congress' fundamental goal...."[7]

2. Vertical Integration

2. A number of commenters contend that Section 628 applies only to vertically integrated programming distributors and vendors.[8] For example, A&E contends that it is clear from Section 628, from the overall statutory framework of the 1992 Cable Act, and from the Act's legislative history that the program access provisions of Section 628 were not intended to apply to cable operators that are not vertically integrated. A&E submits that if Congress had intended Section 628 to reach all cable operators, the minimum specified regulations of paragraph (c) would not contain recurring references to vertically integrated operators. While NCTA submits that certain unilateral, unfair conduct by a cable operator that inflicts serious competitive injury on a multichannel distributor is within the ambit of Section 628, regardless of vertical integration, it asserts that the statute should not

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2; UVI Reply at 1-2; Viacom Reply at 2.

[2] APPA at 6.

[3] See, e.g., ACC Reply at 2; CableAmerica at 10-11; CSS Reply at 2; DirecTV at 7-8; Manitowoc Reply at 2; NPCA at 20-22; NRTC at 9 & 33-34; NRTC Reply at 2; NTCA at 3; TRAC at 2-3; USTA at 4-5; WCA at 2-3.

[4] CableAmerica at 10.

[5] Manitowoc Reply at 2.

[6] NRTC at 9.

[7] WCA at 3.

[8] See, e.g., A&E at 2-4; CableAmerica at 11-12; ESPN Reply at 1-4; Landmark at 9; NCTA at 11; NCTA Reply at 16-17; Time Warner at 3-8.

be read to restrict relationships between cable operators and non-vertically integrated programmers. Time Warner contends that the Commission should not hold the conduct of a programming vendor to be an unfair practice unless the programming vendor acts on incentives resulting from it being vertically integrated with a cable operator.

3. Other commenters assert that while Section 628 applies only to vertically integrated programmers, it applies to all cable operators, regardless of whether they are vertically integrated.[9] For example, APPA submits that the omission of the term "attributable interest" in Section 628(b) when referring to a cable operator is not only clear and unambiguous, but is particularly conspicuous when contrasted with the express inclusion of that term in the same sentence when referring to satellite cable programmers. WJB contends that the references to vertically integrated programmers in Section 628(c) are merely examples of some of the types of conduct that are to be covered and do not imply that the statute covers only vertically integrated cable operators. The Attorneys General believe that, in addition to self-serving conduct by a cable operator, the rules should focus on conduct intended to benefit the cable industry at the expense of other distribution technologies. Time Warner takes issue with this reading of the statute, and argues that the unqualified mention of the word "cable operator" in Section 628(b) could be of consequence only if the Commission were to adopt rules that go beyond those required under Section 628(c)(2), which it believes would be inappropriate.[10]

4. With respect to satellite broadcast programming vendors, some commenters suggest that Section 628 only applies to vertically integrated vendors, although the statute does not so specify.[11] Other parties, however, submit that the statute applies to all satellite broadcast programming vendors.[12]

5. In addition, some commenters argue that an entity should only be subject to the provisions of Section 628 in those markets in which it is vertically integrated (i.e., operates a cable system that purchases programming from its affiliated cable operator).[13] For example, TCI argues that a vertically integrated programmer has neither the incentive nor the ability to favor a cable operator with which it has no ownership interest. Time Warner

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[9] See, e.g., APPA at 7-8; Attorneys General at 4-5; Bell Atlantic Reply at 3-5; CCWCO at 2; NSPN Reply at 4-5; NYNEX at 6; USSBC at 2; U.S. West at 5-6; U.S. West Reply at 3; WJB at 5-6; WJB Reply at 4.

[10] See Time Warner Reply at 5-6.

[11] See, e.g., Continental at 8-10; Primetime 24 at 4-6; Superstar at 5-7; UVI at 13-15.

[12] See, e.g., GTE Reply at 5-6; WJB Reply at 4; DirecTv at 10 n.13.

[13] See TCI at 10-11; Time Warner at 7-8; Viacom at 10-12; Discovery at 20; Landmark at 9; NCTA at 11.

asserts that a programming vendor has an incentive to sell as much programming as possible in locations where it is not vertically integrated. Viacom argues that a vertically integrated entity has no incentive to favor one competitor over another in areas where it does not have an interest in both sides of the transaction. In opposition, APPA submits that size and market power alone can give cable operators enormous clout over programming vendors, without regard to whether vertical integration exists in any particular local market.[14] Similarly, Bell Atlantic argues that the fact that a vertically integrated company does not have an affiliated cable operator in a particular locality does not mean that it cannot restrict the availability of programming in that area.[15] WCA agrees, arguing that such a limitation was not intended by Congress.[16]

3. Attribution of Ownership Interests

6. Commenters generally advocating a five percent attribution threshold[17] note that the Commission has developed precedent interpreting and implementing the five percent standard, since that standard is currently applicable to the Commission's broadcast multiple ownership rules, the video dialtone rules and the cable/network cross-ownership rule, and they submit that Section 628 and these existing Commission rules have similar purposes. Some commenters suggesting a five percent standard additionally advocate further safeguards. For example, DirecTV suggests that the Section 628 standard should also deem attributable debt interests that are convertible to five percent or more voting equity, a common officer or director or any interests that include a right to elect an officer or director, all general partnership interests, and limited partnership interests of five percent or more.[18] The Competitive Cable Association submits that the definition of an attributable interest should account for common officers or directors or substantial financial support, and should include a situation where one of the local cable operations in a competitive situation is owned or controlled by any of the top 100 MSOs (or, alternatively, any MSO that has access to 50,000 or more subscribers nationwide).[19]

7. Commenters supporting a threshold lower than five percent include

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[14] See APPA at 11; APPA Reply at 6-8.

[15] See Bell Atlantic Reply at 6-7.

[16] See WCA at 30-34.

[17] See ACC at 4-5; ACC Reply at 4; Ameritech at 5-6; BellSouth at 11-12; CableAmerica at 13; CSS at 13; CSS Reply at 5; DirecTV at 14; Liberty Cable at 26; NCTA at 2; Turner at 14-15.

[18] See DirecTv at 14.

[19] See Competitive Cable Association at 5-6; contra Landmark Reply at 13-14.

ACC, APPA, Cross Country, NRTC, NYNEX and WCA.[20] These commenters contend that a five percent shareholder could represent a significant interest, particularly in a large, publicly-held corporation. They also assert that the cable industry is highly concentrated and that, as a result, vertically integrated cable operators have incentives to unduly influence programmers. For example, WCA advocates a one percent threshold for corporations with more than 50 shareholders. Bell Atlantic suggests that an attribution rule stricter than the five percent cable/telco cross-ownership standard might be appropriate for cable operators because the 1992 Act bars cable operators from exercising "influence" over a programmer, whereas the cable/telco rules bar only "ownership or control."[21] Similarly, while CSS supports a five percent threshold, it submits that Congress may have intended to have any level of ownership interest by a cable operator, no matter how small, be sufficient to trigger the statute.[22] NRTC likewise advocates a strict attribution standard, but urges the Commission to determine the scope and implementation of any standard before that standard is adopted.[23]

8. Several commenters propose that the attribution benchmark should be higher than five percent. They contend that cable operators' investment has been instrumental in the development of programming services. For example, Cablevision/Comcast/Cox suggests an attribution standard of 10 to 20 percent.[24] Small System Operators advocates a 20 percent equity ownership standard. IFE suggests a threshold of 25 percent of voting power, but submits that a cable operator should be permitted to rebut the 25 percent threshold if it can show that (1) the program vendor has a single majority shareholder that is not a cable company; or (2) the programmer has a set of related or affiliated shareholders with majority voting power, none of which are cable companies (e.g., two 30 percent shareholders that are parent and subsidiary corporations); or (3) that the cable company shareholder has no representative on the programmer's board of directors; or (4) that other circumstances indicate that the cable company operator stockholder is not in a position to implement business practices by the cable programmer that could have anticompetitive effects on consumers.[25]

9. Of the commenters proposing a higher threshold, a number of cable interests seek a standard based on majority control of an affiliated programmer. These commenters contend that a cable operator would have to control a programmer in order to force it to incur the significant losses that

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[20] See ACC Reply at 4; APPA at 9; Cross Country Reply at 10-11; NRTC at 25-26; NRTC Reply at 31-32; NYNEX at 7-8; WCA at 24-28.

[21] See Bell Atlantic at 4 n.8.

[22] See CSS at 5.

[23] See NRTC at 25-26.

[24] See Cablevision/Comcast Reply at 19-21.

[25] See IFE at 3-6.

would result from restricting its sales to other distributors. For example, Discovery urges the Commission to define an attributable interest as either holding 50 percent or more of the outstanding voting securities or having the contractual power to designate 50 percent or more of the board of directors.[26] NCTA argues that at a minimum, actual voting control (50 percent ownership) or some evidence of working control should be required before a cable operator is deemed to have an attributable interest in a programmer for purposes of Section 628.[27] UVI similarly contends that the attribution should be at least 51 percent, or should focus on the contractual degree of control necessary to dominate corporate decisionmaking.[28] In opposition, a number of commenters point out that although cable interests seek a 50 percent attribution standard in this context, they considered a five percent standard too high in the video dialtone proceeding.[29] Further, these commenters contend, Congress rejected an attribution standard based on control when it rejected the Manton amendment to the 1992 Act.[30]

10. A few commenters urge the Commission to adopt behavioral guidelines rather than an attribution threshold, arguing that a numerical standard does not necessarily portend a cable operator's ability to influence the decisions of the programmer. For example, Continental submits that the Commission should consider a showing by the cable operator that it does not exercise sufficient control to exert improper influence in the decisions of the affiliated programmer.[31] Liberty Media argues that absent the kinds of factors considered with respect to unauthorized transfers of control (e.g., control over station finances, personnel and programming), a cable operator's interest in a programmer should not be deemed cognizable.[32] Discovery suggests that if an attributable interest is defined as something less than 50 percent control, the regulations might exempt programmers that reach more than 50 percent of subscribers to alternative technologies and companies that do not own or produce programming but merely provide a conduit for programming distribution.[33] TRAC and USSB also advocate adoption of a behavioral test, contending that a cable system could affect the business practices of a programmer with a small percentage of voting ownership.[34] TRAC suggests that

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[26] See Discovery Comments at 16-18; Discovery Reply at 3-5.

[27] See NCTA Comments at 15-19; NCTA Reply at 24-25.

[28] See UVI at 12-13.

[29] See, e.g., DirecTv at 13 n.18; Manitowoc Reply at 17-18; NRTC at 25-26; WCA at 26-27.

[30] See DirecTV Reply at 4 n.3; WCA Reply at 6-8.

[31] See Continental at 7-8.

[32] See Liberty Media at 17-18.

[33] See Discovery at 16-18.

the Commission consider voting rights, options exercisable under coercive terms, convertible debt, and other factors.

11. In addition, a number of commenters propose exceptions to whatever attribution rule is adopted. For example, E! suggests a safe harbor exception for start-up program services or other program vendors with less than 50 percent national penetration.[35] Group W proposes that cable operators that serve less than one percent of all cable households nationwide should be exempt from the attribution benchmark.[36] Similarly, Landmark and Turner argue that relatively small MSOs should be exempt from the attribution rule.[37] Landmark also argues that the Commission should exempt vertically integrated programmers for which there are close substitutes, those that are in their start-up or developmental stage, and those that, by virtue of low penetration, can be presumed not to be competitively necessary for any multichannel video programming distributor.[38] Rainbow suggests a cable operator should be exempt from attribution if it serves fewer than 10 percent of all cable subscribers nationwide and an unaffiliated non-cable entity holds at least a 20 percent ownership interest its affiliated programmer.[39] Lifetime and Viacom suggest that a cable operator should be exempt from attribution if it accounts for a minimal number of the affiliated programmer's subscribers; Lifetime proposes five percent or less, and Viacom proposes less than five percent.[40] Viacom submits that programmers that rely on unaffiliated distributors for 95 percent of their subscriber base have no incentive to distort their operations so as to bring about the anti-competitive results that Congress sought to deter.

12. Regardless of what attribution standard is ultimately adopted, commenters are divided on whether that standard should incorporate a single majority shareholder rule similar to that included in the broadcast multiple ownership rules. ACC, Ameritech, NRTC and Small System Operators submit that the single majority shareholder rule should not be applicable.[41] These commenters submit that the single majority shareholder exemption is not

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[34] See TRAC at 4; USSB at 2-3.

[35] See E! at 6-7.

[36] See Group W at 6-7.

[37] See Landmark Reply at 14-15; Turner at 15, n.17.

[38] See Landmark at 20-27. Landmark further submits that the Senate Report indicates that The Weather Channel, which is owned by Landmark, is not a vertically integrated company for purposes of the program access provision. Id. at 20 (citing Senate Report at 25).

[39] See Rainbow at 12-16.

[40] See Lifetime at 11-12; Viacom at 3-10.

[41] See ACC Reply at 4; Ameritech at 5-6; NRTC at 31-32; Small System Operators at 3.

appropriate because minority stockholders may have significant influence over a programmer's decisions even if they do not technically control that programmer. On the other hand, BellSouth, Continental, IFE, Liberty Media, Lifetime and Turner believe that the Commission should apply the single majority shareholder rule in this context.[42] Lifetime submits that the Commission has recognized the significance of a majority shareholder in other situations; for example, a "substantial" transfer is one in which a voting interest of 50 percent or more passes to a new party.

13. Commenters also disagree as to whether the Section 628 attribution rule should include other factors considered in conjunction with the broadcast attribution rule. For example, Continental argues that the rules should exempt situations where the cable operator holds limited partnership interests, non-voting stock or other interests not deemed attributable under the broadcast attribution rule.[43] CableAmerica contends, however, that no provisions of the broadcast rule other than the five percent attribution standard should apply.[44] In addition, while Liberty Media asserts that the Section 628 rule should include the broadcast limited partnership insulation criteria,[45] DirecTv suggests that the rule should instead exempt limited partnership interests of less than five percent.[46] Further, a number of commenters suggest that relationships involving common officers and directors should be attributable,[47] although Lifetime argues that its proposed exception should operate regardless of whether a cable operator with a minority share in a programmer has a common officer or director with that programmer.[48]

B. Harm

14. Commenters supporting the approach suggested in the Notice generally contend that Section 628 only prohibits conduct that is both "unfair" and causes "harm."[49] Under this interpretation, subsection 628(b) establishes

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[42] See BellSouth at 12 n.17; Continental at 7; IFE at 5-6; Liberty Media at 17-18; Lifetime at 8-11; Turner at 14-15.

[43] See Continental at 7-8.

[44] See CableAmerica at 13.

[45] See Liberty Media at 17-18.

[46] See DirecTv at 14.

[47] See Small System Operators at 3; Competitive Cable Association at 6-7; DirecTv at 14; IFE at 5-6; WCA at 24-28.

[48] See Lifetime at 8-11.

[49] See Discovery at 18-19; E! at 5; Group W at 9; Landmark at 5; Liberty Media at 5-6; NCTA at 7; Rainbow at 5 n.9; Superstar at 33; TCI at 5; TBS at 17; UVI at 16; Cablevision Reply at 2-3; Discovery Reply at 6; Liberty Media

a "threshold showing" that aggrieved distributors must meet before the prohibitions in subsection 628(c) become applicable.[50] For example, NCTA argues that if a programmer sells programming at price differentials that would be considered unfair conduct under subsection 628(c)(2)(B), and the price differences cannot be justified under one of the four exceptions enumerated in subparagraphs (i) through (iv), the programmer's conduct should not be prohibited in any particular case unless an aggrieved distributor can demonstrate that this conduct has significantly hindered its ability to compete.[51] Similarly, Liberty Media argues that Congress imposed an injury-in-fact requirement on any party alleging a violation of 628(c), and would not have imposed this requirement if it had determined that a programmer's conduct necessarily caused competitive injury. It contends that if Congress had determined that practices in subsections 628(c)(2)(A) through (D) cause "competitive harm," then it would not have instructed the Commission regarding the public interest factors enumerated 628(c)(4)(A) through (D).[52]

15. With respect to the degree of injury a distributor must show, a number of commenters propose that the unfair practice complained of must have sufficiently hindered the distributor's ability to provide comparable programming so that its ability to compete is substantially impaired.[53] Discovery argues that an MVPD should not be allowed to file a complaint against a vertically integrated programmer on the grounds that it has been significantly hindered in delivering that particular programmer's programming: "[r]ather, the unfair or deceptive practice complained of must have sufficiently hindered the distributor's delivery of comparable programming so that the distributor's ability to compete in the marketplace for the distribution of programming is substantially impaired."[54] Similarly, Liberty Media suggests that when a complainant receives programming at less favorable prices, terms or conditions than does another distributor, the complainant must show that the disparity is reflected in the favored distributor's retail pricing and that the complainant therefore is not able to compete effectively with the favored distributor in selling programming to consumers.[55] Other commenters propose requiring complainants to make additional demonstrations

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Reply at 4; Viacom Reply at 8.

[50] See Landmark at 5; Liberty Media at 6; NCTA at 7-8; Rainbow at 5; Superstar at 37; Liberty Media Reply at 5; Viacom Reply at 8.

[51] See NCTA at 8. NCTA further states that this analysis should apply for any of the activities prohibited under subsection 628(c)(2).

[52] See Liberty Media Reply at 5-6.

[53] See Discovery at 19; Group W at 8-9; NCTA at 9-10; TCI at 30; Time Warner at 9-11; UVI at 18; Discovery Reply at 5; Liberty Media Reply at 36-39; Viacom Reply at 10.

[54] Discovery Reply at 5.

[55] See Liberty Media at 5-6.

concerning the extent to which they have been "harmed significantly" by a programmer's conduct. For example, Time Warner contends that the appropriate standard for measuring harm is not whether a particular distributor can show that the unfair practice jeopardized its competitive viability, but whether the distributor can show that the practice would jeopardize any well-run distributor.[56] Viacom states that focusing on harm to competition rather than on a particular competitor will preclude a potential complainant from obtaining individual economic gain without any benefit to competition or consumers.[57]

16. In addition, many cable operators and programmers support geographic and vertical integration restrictions on the scope of potential violations of Section 628, asserting that there can be anticompetitive harm only where a vertically integrated cable programmer charges discriminatory prices to different system operators in the same area.[58] Similarly, several commenters propose that only conduct by vertically integrated programmers that favors their commonly-owned operators should be deemed unfair.[59] Finally, several commenters argue that since Congress contemplated that harm was caused primarily by vertically integrated entities, any conduct, pricing mechanism, or other term or condition imposed by non-vertically integrated entities should be exempted from the scope of regulations, as well as any conduct by vertically integrated entities that is similar to that of non-vertically integrated entities.[60]

17. In contrast, numerous commenters strongly disagree with these interpretations and contend that there is no requirement in the statute that the Commission impose a threshold showing of harm to competition.[61] In addition, some of these commenters argue that requiring complainants to meet a threshold showing of harm in subsection 628(c) where none was intended as far as exclusive contracts and discriminatory practices are concerned would undermine the goals Congress sought to achieve in implementing these provisions.[62] Commenters submit that subsection 628(b) broadly states

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56 See Time Warner at 11.

57 Viacom Reply at 12.

58 See Discovery at 20; E! at 6; IFE at 8; Liberty Media at 5-7; Primetime 24 at 9, TCI at 10; Time Warner at 7 n.5, 11; Turner at 17; Viacom at 11.

59 See NCTA at 13; Superstar at 33 n.30; TCI at 8.

60 See Superstar at 33 n.30; UVI at 16.

61 See APPA at 13-14; CableAmerica at 14-15; Small System Operators at 7; CSS at 14; Liberty Cable at 18; NPCA at 23; NRTC at 13; ACC Reply at 5; APPA Reply at 6-7; CSS Reply at 3; Cross Country Reply at 8; DirecTv Reply at 2-3; NRTC Reply at 17; U.S West Reply at 3; WCA Reply at 9-10.

62 See APPA at 16; CableAmerica at 14; NRTC at 13; DirecTv Reply at 3-4.

congressional intent to prohibit practices by video programming vendors that hinder the distribution of video programming. To effectuate this goal, they argue, Congress set forth in subsections 628(c)(2)(A)-(D) what the Commission's regulations, at a minimum, must prohibit. They argue that the proper reading of the statute provides that these practices, unless explicitly justified under the exceptions enumerated in subparagraphs (i) through (iv) of 628(c)(2)(B), are per se unlawful, and that no showing of harm is required.[63] DirecTv submits that this issue was specifically debated by Congress when drafting the program access provisions, and that the result was the rejection of a competing program access amendment to the 1992 Cable Act that was based on an antitrust analysis and that would have required a complainant to demonstrate proof of harm to competition. In addition, some commenters note that the approach suggested in the Notice ignores the fact that the Act allows for relief where conduct has the "purpose" of hindering or preventing a MVPD from providing programming, not just where it has that "effect."[64]

18. These commenters further criticize the cable industry's stance regarding the extent of harm an aggrieved distributor must show in order to make a complaint, arguing that the statute does not require a complainant to prove that a prohibited practice has the effect of causing significant harm to competition (rather than solely to the complainant), or that the viability of its operation must be threatened before the complainant may challenge a programmer's unfair practices.[65] In addition, DirecTv takes issue with Time Warner's argument that an unfair practice is unlawful only if it would endanger the competitive viability of a "well-run distributor," and its concept of what a "well-run distributor" should be, stating that any requirement that all distributors "be hindered" in effect rewrites the statute. DirecTv also complains that subsection 628(b) does not require an MVPD to show that the practice complained of prevents or hinders the MVPD from delivering "any programming at all" to subscribers.[66] Commenters further state that the argument that the statute simply prevents the "destruction" of an MVPD runs counter to the overall objective of the 1992 Cable Act because it would mean that a competitor could not make its case until it had been foreclosed from the market.[67]

19. Some commenters also argue that the local geographic market definition was not called for by the statute, and the Commission should not create any by regulation.[68] CableAmerica explains that a distributor, placed

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[63] See APPA at 13-14; Cable America at 14-15; NRTC at 13; DirecTv Reply at 3-4; NRTC Reply at 17; U.S. West Reply at 3.

[64] See Liberty Cable at 19; CSS Reply at 3.

[65] See APPA at 16; CableAmerica at 16-17; CSS at 14-15; NPCA at 24 n.12; APPA Reply at 6-7; CSS Reply at 3; DirecTv Reply at 4-5; WCA Reply at 10.

[66] See DirecTv at 4-5 & n.4.

[67] See APPA at 16; DirecTv Reply at 4-5.

at a competitive disadvantage with respect to a vertically integrated operator in one market, may be forced subsidize its losses in another market, thereby hindering its ability to provide services in the second market.[69] In addition, commenters argue that Congress banned vertically integrated programming vendors from engaging in conduct prohibited by Section 628 in any market, not just in those specific markets where they own systems.[70] Moreover, WCA states that Congress implicitly rejected the Commission's local market idea as it appeared in the 1990 Cable Report, which proposed that program access rights be limited to those markets where the local cable operator has a cognizable interest in the programmer that refuses to deal with alternative technologies.[71] Finally, several commenters express unfavorable views regarding the suggestion by a number of cable operators that practices by non-vertically integrated operators should be exempt from the scope of regulations adopted under Section 628 and that conduct by vertically integrated operators that is similar to that of non-vertically integrated entities should likewise be exempted from the rules.[72]

C. Undue Influence

20. Parties offer limited comment on the appropriate definition of "undue influence" pursuant to Section 628(c)(2)(A) of the statute. Some commenters propose that undue influence should be presumed if particular conduct is alleged. For example, DirecTv suggests that a prima facie case of undue influence is established if an operator can show that a vertically integrated programmer refuses to sell programming to an unaffiliated distributor that is creditworthy and technically capable of delivering the programming service, or offers programming on unreasonable terms.[73] WJB submits that undue influence should be inferred if price differentials are not reasonable and justifiable.[74] The Attorneys General offer examples of practices other than those specifically mentioned in the statute that constitute undue influence and should be proscribed, such as placing specific restrictions on an alternative distributor's ability to purchase programming

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[68] See CableAmerica at 20-21; DirecTv at 15; CSS Reply at 3.

[69] See CableAmerica at 21.

[70] See Attorneys General at 4-5; CableAmerica at 21-22; WCA at 31-32; APPA Reply at 6-7; Bell Atlantic Reply at 6.

[71] See WCA at 31-32.

[72] See APPA Reply at 4; see also Bell Atlantic Reply at 5 (expressing concern that integrated entities could induce independent programmers to refuse to sell to distributors that use video dialtone to justify their own incentives for not dealing with video dialtone providers).

[73] See DirecTv at 19-20.

[74] See WJB at 13; WJB Reply at 10.

from vendors not affiliated with the cable operator, requiring an alternative distributor sell programming in nonwired areas, imposing minimum subscriber levels on alternative distributors but not on cable operators, and restricting affiliated programmers from marketing to non-cable distributors in cabled areas.[75] In addition, Bell Atlantic contends that the Commission should prohibit any conduct that influences a programmer's decision to sell, to the detriment of a competing distributor.[76] CCWCO submits that rules must be crafted to ensure that no cable operator is permitted to establish any condition in its dealings with program suppliers that would have the effect of denying access to programming to a potential competitor in the market, with the exception of locally originated programming.[77]

21. Other commenters contend that the Commission should require specific proof that a cable operator has unduly influenced an affiliate programmer's decisionmaking. For example, Rainbow contends that the Commission should require proof that, but for the influence of the affiliated cable operator, the programming vendor would not have engaged in the same distribution practices.[78] Superstar and UVI submit that a claimant should be required to provide direct evidence of coercion or threat by a cable operator that is both anticompetitive and uneconomic in intent and effect.[79] TCI would require explicit threats or intimidation in order to show undue influence.[80] Time Warner submits that an undue influence complainant must prove that a communication from a cable operator to a programming vendor actually influenced the vendor's sales-related decision, and that the influence was improper. Time Warner submits that not every communication from a cable operator to a programming vendor comes within the purview of the statute, even if it influences the vendor's decision to sell or the terms at which it sells, and suggests that one way to determine if a communications is proper is to compare the vendor's ultimate sales decision with a similarly situated independent vendor.[81] Time Warner also observes that 628(c)(2)(A) will likely have little practical significant effect since discrimination by a vertically integrated programming vendor is already prohibited by 628(c)(2)(B).[82]

II. Discrimination

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[75] See Attorneys General at 9.

[76] See Bell Atlantic at 5.

[77] See CCWCO at 2-3.

[78] See Rainbow at 12.

[79] See Superstar at 42-44; UVI at 21.

[80] See TCI at 36.

[81] See Time Warner at 15-17, 17 n.15.

[82] Id. at 14.

A. Definition of Discrimination — Standard for Prima Facie Claim

22. A number of multichannel video programming distributors (MVPDs) assert that they face great problems related to facilities-based discrimination. For instance, NRTC asserts that it is required to pay, on average, 460% more than a small cable system despite the fact that purchasing agents for alternate technologies offer program vendors the benefits of a large MSO.[83] To the extent that restricted availability of programming deters new distributors, commenters contend that the rules should preclude incumbent cable operators from exploiting their strategic dominance through affiliated programmers.[84] Also, small cable operators complain that the price, terms, and conditions imposed on multichannel video distributors who lack market power are often discriminatory and anti-competitive.[85] They argue that small operators need to acquire programming to meet the demands of their customers, and that failing to carry one of these programming services, or proposing to drop one, may generate intense pressure from the franchising authority. Small operators also assert that program services with market power are able to extract prices from the smaller operators that are higher than the competitive level, and are able to impose terms and conditions that add to the programmers' profit and increase price to consumers without concomitant economic benefit.[86]

23. Some MVPDs support a blanket prohibition on price differences in the sale or delivery of programming to multichannel service providers,[87] and some commenters call for a "bright line test" to identify prohibited practices.[88] Because of the harm caused to both consumers and competition through differential pricing, commenters argue that strict control over such discriminatory practices is in the public interest.[89] For example, Liberty Cable asserts that discrimination can be explicit, as with a special rate-card, but can also occur indirectly, and contends that the rules should provide that direct or indirect discrimination by programmers will be presumed illegal.[90]

24. Alternative MVPDs generally argue that to establish a prima facie

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[83] See NSPN at 8-9; NRTC at 18; NTCA at 4; Liberty Cable at 6.

[84] See USTA at 10.

[85] See CATA at 4.

[86] Id. at 4-5.

[87] See, e.g., ACC at 6.

[88] See, e.g., Liberty Cable at 4; MPAA at 14-15; DirecTv at 12; BellSouth at 7; U.S. West at 12; NRTC at 15-16; Pactel at 1-6; CableAmerica at 20-30; USTA Reply at 5.

[89] See ACC at 6; CableAmerica at 8-9.

[90] See Liberty Cable at 7-8.

claim under 628(c)(2)(B), a distributor should need only to allege a difference in price, terms, or conditions for the provision of programming.[91] They argue that the burden then should shift to the programmer to provide accounting support to justify the different treatment based on costs or the other legitimate factors enumerated in the statute.[92] These commenters argue that the shifting of burdens is appropriate because any relevant information to justify a price differential would be within the possession of the programmer. Some commenters argue that the Commission's proposed allocation of burdens in enforcing and implementing the Act contravenes Congressional intent to promote competition, and that the Commission should not reexamine matters already addressed by Congress.[93] CATA submits that an aggrieved operator should be required to show that the discriminatory conditions exist or are contained in the operator's program affiliation agreement. When the complaint is filed, CATA argues, the program vendor should supply evidence that the price, terms and conditions at issue are either uniform for all multichannel program distributors or impose reasonable requirements for the factors that are explicitly permissible under the statue.[94] ACC states that the Commission should establish a high burden for cable operators to permit the use of a bulk discount and should strictly limit the amount or degree to which any cable operator may receive a discount.[95] Attorneys General assert that the Commission should mandate a pricing structure, applicable uniformly to all delivery systems, that reflects actual costs incurred by the programmer in providing programming to the various delivery systems, and they argue that factors such as discounts for prepayment or marketing allowances, should not be reflected in the pricing structure of programming sales.[96]

25. Programming vendors, on the other hand, advocate a stricter standard for identifying discrimination, and assert that the Commission should consider price differentials "discriminatory" only when the practices have a reasonable prospect of injuring competition; by definition, this construction would not include de minimis or temporary price differences. They argue that the Commission should not consider a high price harmful to competition if it is lower than the perceived market value of the programming based on objective third-party studies.[97] EMI asserts that forced uniform pricing for programming distributors will ultimately reduce the amount of satellite broadcast programming available to subscribers.[98] The vendors also claim that the

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[91] See, e.g., DirecTv at 21; NRTC at 15-16; USSB at 3-4; Caribbean at 4.

[92] See USSB at 3-4.

[93] See TRAC at 1-2.

[94] See CATA at 6-7.

[95] See ACC at 9.

[96] See Attorneys General at 10.

[97] See Discovery at 23-25; Time Warner at 17-18.

program access aspects of the statute should not require that programmers deal with all potential customers.[99]

26. NCTA suggests that before deciding whether a particular difference in price or terms is unjustified and has significantly hindered a competitor, the Commission must first determine whether a difference really exists because certain prices, terms or conditions, though not identical, are actually comparable.[100] Some vendors also believe that price differences do not necessarily amount to price discrimination,[101] and that discrimination provisions will be hard to implement because of variations in markets and business from technology to technology and from distributor to distributor. These vendors contend that some practices may benefit competition,[102] and that the burden of proof should remain on the complainant. Furthermore, if other similarly situated distributors successfully sell programming in that market, price differences should be presumed not to cause harm. These vendors also claim that the presence of only a few HSD subscribers in urban areas should not determine whether HSD distributors are significantly hindered in such markets.[103] Viacom states that a distributor should be required to show a significant hindrance from providing programming to consumers. Otherwise, in the absence of such a showing, Viacom states that a distributor who suffers no competitive harm because it still possesses an ample supply of other programming to remain a viable competitor would be able to maintain a complaint.[104]

27. Program vendors propose similar tests to determine discrimination, all of which require more than showing just that a price difference exists, and generally involve aspects such as: (1) the programming vendor offered materially different prices, terms, or conditions to the complainant and other distributors; (2) the differences were not justifiable; and (3) the purpose or effect of was to significantly hinder or prevent distribution of programming to subscribers or consumers.[105] Viacom suggests that in order to establish a

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98 See EMI at 9-10.

99 See Turner at 12, Liberty Media at 21.

100 See NCTA at 20.

101 See, e.g., Rainbow at 6; Superstar at 45; Turner at 12-13.

102 For example, ARC is concerned that overly restrictive regulations may inhibit the distribution of regional sports programming through concentric pricing, undermining not only the public interest in program diversity, but also the "substantial governmental interest" in the local origination of programming. ARC at 8-9.

103 See Superstar at 44-46.

104 See Viacom at 13.

prima facie case, a complainant must show that it does or will actually compete for sale of programming with a cable system with an attributable interest in a program vendor, that it can identify subscribers it has lost to another distributor because that other distributor received more favorable term and conditions, and that it will be significantly hindered or prevented from providing programming if it cannot obtain the challenged service on non-discriminatory terms.[106] Discovery suggests that to the extent that a price differential is presumed nondiscriminatory, the regulations should provide that this presumption can be overcome only if the complainant can show both significant injury to consumers, in terms of either higher rates or inability to view desired programs, and a price differential higher than prices charged to the complainant by similarly situated, non-integrated programmers. To the extent that a price differential is presumed discriminatory, Discovery argues, the program vendor should be able to rebut the presumption by showing either that at the time it charged the price it had justification for doing so, or that there has been no actual injury to competition.[107]

28. Liberty Media suggests that the Commission should base its standard of discrimination on principles common to other statutory schemes but should account for the unique characteristics of multichannel programming. Liberty Media submits that "discriminatory" conduct first requires that the services be "like,"[108] and that requiring uniform prices, terms and conditions or limiting price differentials only to cost differences would substantially reduce carriage of these networks on cable systems in outlying areas, and the would result in restricted quantities of programming at higher prices, to the detriment of consumers. Liberty Media contends, cable operators and HSD distributors are not similarly situated, as cable operators can commit their systems for a contract term while HSD or SMATV distributors seek conditions relieving them from contractual obligations when subscribers drop the distributor's service during the term of the contract. Liberty Media also submits that programmers may offer a different rate in exchange for certain carriage (i.e., basic tier) and other services.[109]

29. Superstar addresses issues related specifically to satellite broadcast programming vendors and states that because of the presence of competition and wide availability of superstation programming, there should be less stringent regulation of superstation distribution. If overcharging were

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105 See EMI at 3-4, Viacom at 12-14, Turner at 9, ARC at 12.

106 See Viacom at 21-22.

107 See Discovery at 25-26.

108 See Liberty Media at 20-21 (citing 47 U.S.C. Section 202(a) and AT&T Communications, 5 FCC Rcd. 298, 301 (1990)); but see NRTC at 26-29 (asserts that Congress created one class of MVPD entitled to protection from discrimination and arguments regarding likeness are attempts to avoid program access provisions of the statute).

109 See Liberty Media at 25-26.

occurring, Superstar argues, it would be met by other competitors coming into the market and cutting prices. Superstar submits that wide percentage price differences as alleged in the record correspond to relatively small actual differences in amounts paid. Superstar further asserts that the purpose of the Act is to protect competition, not competitors, and there is no legal basis to give certain competitors a particular advantage to allow them to compete more effectively. Superstar contends that the additional facilities of packagers like NRTC are duplicative with respect to services provided by vendors, and that customers often call the satellite broadcast programming vendor instead of distributors for customer service. Superstar also argues that no superstation programmers have market power and there is no basis for the Commission to conclude that any price differentials for superstation programming are causing competitive harm.[110]

30. Some commenters assert that the Commission should require that each vendor annually file its standard rate card and that where price differences exist, the vendor must explain the difference.[111] Time Warner opposes a requirement for vendors to file their rate cards, arguing that there is no Congressional directive to treat programmers like common carriers, that complainants will still have access to rate cards through discovery, and that a filing requirement would generate unnecessary paperwork.[112]

B. Vertical Integration as Standard to Determine Discrimination

31. Commenters also differ regarding the suggestion in the Notice that the conduct of a non-vertically integrated programmer be used as a standard to determine whether a vertically integrated programmer was engaging in discriminatory practices. Some commenters assert that conduct by a vertically integrated programmer should not be deemed unfair if it is no different from the conduct, in comparable circumstances, of non-integrated programmers.[113] They argue that Section 628 does not deal with possible coercive practices of cable operators but with the anticompetitive incentives and abilities of vertically integrated programmers. Similarly, TCI asserts that if a particular practice of a vertically integrated company is common to non-vertically integrated companies it should be presumed to not violate Section 628.[114] Commenters also argue that price differences involving integrated programmers that are similar to those offered by nonintegrated programmers should be excluded from coverage.[115] Alternative MVPDs strongly object to such a

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110 See Superstar at 47.

111 See NPCA at 15-16; APPA at 22-23.

112 See Time Warner Reply at 12-13.

113 See NCTA at 20.

114 See TCI at 11.

115 See Discovery at 24; Rainbow at 8.

standard, arguing that it would allow discriminatory practices prohibited by the statute.[116] They argue that the fact that such practices may be employed by non-integrated programmers is irrelevant to the legislative determination to bar their use by integrated entities.

C. Options Proposed in the Notice Regarding Discrimination

32. The Notice sought comment on four proposed options for developing standards to distinguish between justifiable and discriminatory price differences. Specifically, the Notice suggested the rules be based on (1) an allowance for a "reasonable" price differential; (2) Section 202 of the Communications Act; (3) antitrust standards from Section 2 of the Clayton Act, as amended by the Robinson-Patman Act; and (4) price comparisons as applied in other regulations, including those used in "anti-dumping" analysis. Although most comments focus on various aspects of the specific options, a few commenters offer general objections to all of the standards. Various alternative distributors argue that Congress clearly established justifiable causes for price differentials in Section 628(c)(2)(B)(i) through (iv), which the Commission should not attempt to broaden.[117] According to these parties, each of the options is inappropriate in the context of the statute, and the statute itself should serve as the appropriate model.[118]

33. NCTA states that none of the proposed options are within the objectives of Section 628. NCTA contends that cable operators, unlike most regulated common carriers, operate in a highly competitive marketplace. NCTA also argues that the Robinson-Patman Act's distinctly protectionist origin has often caused the statute to limit rather than promote competition, whereas Section 628 is intended to promote competition and prevent anticompetitive behavior. Further, NCTA asserts that the legislative history of Section 628 makes clear that differential prices can also be justified by differences in the buyers' costs of selling and delivering the programmer's product.[119] EMI believes that the four proposed options are unnecessary, because regulating the marketplace for satellite programming requires considerations of competition that are distinct from the arenas where each of the options apply. Instead, EMI recommends that unlawful discrimination should be deemed to exist if a programming vendor offers prices, terms, or conditions that are (1) materially different for different distributors, (2) unjustifiable, and (3) have the purpose or effect of significantly hindering or preventing the distribution of satellite programming to subscribers or consumers.[120] Rainbow contends that given the disadvantages of each option, the Commission should rely on case-by-

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116 See, e.g., DirecTV at 25 n.31; WJB at 14; CableAmerica at 12; WCA Reply at 11.

117 See, e.g., DirecTv at 20; NRTC Reply at 18.

118 See DirecTv at 21.

119 See NCTA at 23-27.

120 See EMI at 4.

case adjudication. Rainbow believes that an emerging standard would cause less disruption to the industry, and the Commission could gauge the import of its decisions more effectively because parties would be likely to place a disputed price or practice in the context of normal industry practices.[121]

34. Conversely, APPA believes that any of the Commission's four options would work, provided that the final regulations fully reflect the pro-competitive purposes of the Act, avoid imposing inappropriate burdens of proving injury on claimants, and provide a mechanism to ensure that all concerned parties have access to sufficient information regarding prices and terms.[122] Liberty Media similarly states that each of the statutory schemes to which the Commission has referred for guidance allows for price adjustments to meet competition.[123]

1. Allowance for a "Reasonable" Price Differential

35. Many commenters support the proposal of the Notice to allow for a presumption of "reasonable" price differentials because of the pricing flexibility that is necessary for vendors to sell programming, especially in terms of cost, volume, and manner of carriage or marketing differences, as demonstrated by a broad range of industry sales practices.[124] Many satellite programming vendors and MSOs argue that Section 628(c)(2)(B)(i) through (iv) explicitly permits vendors to allow for certain differences among distributors differentials in establishing programming contracts. Time Warner claims that it is impossible for the Commission to assign values to different contractual terms or to establish fair prices for each contract, and that a "reasonable region" could result from the statute's permissible pricing distinctions.[125] Viacom asserts that if the Commission requires uniform pricing within or across distribution technologies and makes information regarding such pricing levels available to the public, the implementing rules would clearly eliminate price and non-price competition for programming, contrary to the objectives of the 1992 Cable Act.[126] NCTA adds that without an established region for "reasonable" pricing differences, the Commission will face an unrealistic burden of adjudicating complaints seeking identical rates.[127] As a result, NCTA and Time Warner agree that it is unnecessary for the Commission to

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121 See Rainbow at 11 n.20.

122 See APPA at 22-25.

123 See Liberty Media at 42.

124 See, e.g., Time Warner at 28, UVI at 23, Viacom at 19, TCI at 13, NCTA at 23, ARC at 14, Landmark at 15.

125 See Time Warner at 28.

126 See Viacom at 17-18.

127 See NCTA at 22.

determine whether comparatively small differentials are "unfair", "unjustified", or "discriminatory", because a price differential falling within the "reasonable" region is probably justifiable by a vendor, and unjustifiable differentials are likely to be so slight that a complainant could not demonstrate that the higher price caused a significant hindrance.[128]

36. Commenters that support the proposal allowing for a "reasonable" region of price differentials also recommend various criteria for establishing its bounds. For instance, Time Warner recommends using three bands for price differentials that would allow for irrebuttably reasonable differences of plus or minus 15% or less, a larger region for rebuttably reasonable differences, with a provision for rebuttably unreasonable differences of greater magnitudes.[129] Viacom also supports a zone of 30% variances for an irrebuttable presumption of legality in order to prevent excessive time spent in resolving complaints.[130] TCI, Landmark, and NCTA suggest using the pricing behavior of non-vertically integrated programmers as a model for a region of reasonable pricing behavior, because the 1992 Cable Act's purpose was to prevent vertically integrated programmers from acting on their incentive to favor affiliated cable operators.[131] Finally, IFE believes that the Commission should use a benchmark based on a significant percentage different in subscribers' bills.[132]

37. By contrast, numerous commenters object to the option allowing for a "reasonable" region for price differentials. Alternative distributors, including DirecTv, NRTC, and CableAmerica, with support from Bell Atlantic claim that the option would ignore that any price differential -- or a difference in terms -- is presumptively unlawful under the 628(c)(2)(B)(ii), such that a "reasonable price differential" is contrary to the specific provisions in the statute.[133] Similarly, WCA believes that the Commission could not develop a "reasonable" region that would rationally relate to facts in a given case. Therefore, the proposed option would have a chilling effect

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128 See NCTA at 22; Time Warner at 28.

129 See Time Warner at 29-30. As a justification, Time Warner claims that a 15% pricing differential is not unusual in pay services. Also, their "rate cards" that establish differentials for a distributor's retail price charged to subscribers, total number of subscribers, and ratio of subscribers for pay to basic services demonstrate maximum and minimum rates that vary roughly 15% from the midpoint.

130 See Viacom at 19.

131 Landmark states that the Commission could create a range based on an absolute price differentials or percentage differences, although a percentage calculation may produce anomalous results at comparatively small absolute amounts. See Landmark at 15; see also TCI at 13; NCTA at 22-23.

132 See IFE at 10.

133 See DirecTv at 21; NRTC at 19; CableAmerica at 29.

on distributors by shifting an unrealistic burden to complainants; cable operators would pressure programmers to discriminate to as far as the bounds of the "reasonable" region and program vendors still attempt to satisfy their largest customers.[134] APPA argues that the Commission should consider using a "zone of reasonableness" only as last resort, and instead should require programmers to publish prices for their services in order to facilitate availability to all distributors.[135]

38. Several commenters with cable interests also oppose the option for a "reasonable" region due to the difficulty of accommodating the distinct pricing considerations by various vendors among various distributors.[136] For instance, Superstar observes that the Commission would have difficulty determining appropriate bounds for a "reasonable" region due to divergent consequences of absolute and percentage-based differentials. They continue that although the option could eliminate many frivolous complaints, the process of using the presumptions associated with the "reasonable" regions would remain too time consuming for the Commission and participating parties.[137] Liberty Media claims that this proposed approach could become arbitrary and capricious, while dampening price competition among programmers. Nonetheless, if the Commission determines to pursue a "reasonable" region, multiple alternative regions of broad price differentials would become necessary to encompass the basic differences among various distributor technologies.[138]

39. In response, Time Warner questions arguments raised by parties opposing the "reasonable region", because even those complainants who could show price differences that might be construed as an "unfair practice" under 628(c)(2)(B) would still need to show some competitive injury, which is arguably impossible.[139] Viacom recommends a "zone of reasonableness" based on the numerous and legitimate factors for permissible price differentials recognized in Section 628, which would preclude obstructive discrimination claims based on differences the Act considers reasonable.[140] NCTA observes that DirecTv and NRTC oppose the "reasonable" region because it would establish

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134 See WCA at 37-38.

135 See APPA at 23-24. In reply, Liberty Cable opposes a 30% range of reasonableness as too broad. See Liberty Cable Reply at 4.

136 See, e.g., Superstar at 53-54; Liberty Media at 45.

137 See Superstar at 53-54.

138 See Liberty Media at 46.

139 See Time Warner Reply at 9-11.

140 See Viacom Reply at 7. Viacom also recognizes the concerns raised by Landmark regarding the difficulties caused by a percentage based "reasonable" region, and agrees that, where appropriate, the Commission should adopt a "zone" bounded by absolute dollar terms.

a "safe harbor" for discrimination contrary to the statute, but NCTA argues that the proposed zone would only determine where the burden of proof lies, which the Act does not establish.[141] Without establishing presumptively reasonable and unreasonable price differentials, NCTA argues it would be more reasonable to presume that all differentials were justified and place the burden of proof on the complainant.[142] NCTA also states that nothing in the 1992 Cable Act suggests that, as a general matter, all differentials should be presumed either to be unlawful or to be one of the four permissible types. Indeed, according to NCTA, it is most likely that program vendors will sell services at different prices to different distributors for wholly legitimate reasons.

2. Section 202 of the Communications Act

40. A number of commenters support the use of Section 202 of the Communications Act as a standard to determine discrimination, stating that a reasonable differential can only be determined in the context of a specific case, and that a 202 type standard is better adapted to price discrimination on services and fairer to litigants than the other models. In such instances, complainants would demonstrate a violation where a defendant has discriminated unreasonably in providing like services, with the burden shifting to the defendant to justify the difference where the defendant controls the relevant information.[143] Superstar supports use of 202 standard, which would permit complaints only where services are like and unjust discrimination has occurred.[144] Similarly, UVI supports use of 202 standard, as the analysis used under this standard directly reflects the statutory provisions of 628(c)(2)(B)(i)-(iii).[145] WCA states that a 202 type standard is the most applicable starting point, and ACC and Bell Atlantic support incorporating the

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141 See NCTA Reply at 28.

142 See NCTA Reply at 29-30. NCTA states that complainant would have to show all elements of the discriminatory practice, including that a differential exists and that it doesn't fit into one of the four types permissible under 628(c)(2)(B)(i)-(iv). At most, the Commission might give a vendor the burden of coming forward with an explanation of why the differential is justified under one of the four criteria. If so, the burden of persuasion would then shift back to the complainant to prove that the programmer's justification is not supportable. With very large differentials, the burden of persuasion could be shifted to the programmer; and de minimis differentials would relieve the programmer from the burden of coming forward with a justification. Yet, in all cases, the complainant bears the burden of demonstrating that the conduct has the purpose or effect of preventing or significantly hindering it from competing.

143 See NYNEX at 14.

144 Superstar makes the argument that service to HSD distributors is not "like" service to other distributors.

145 See UVI at 12.

common carrier standard under which it is unlawful to engage in "unjust or unreasonable discrimination" "in the provision of "like" services or to give any unreasonable preference or advantage to any person.[146]

41. Other commenters suggest using a standard similar to Section 202 with some modifications or reservations. DirecTv states that although Section 202 most closely approximates what Congress intended, the standard nevertheless adds a layer of complexity by requiring the Commission to determine whether the service offered by a program vendor to different distributors are "like" services. DirecTv claims that Congress has determined that, for the purposes of enforcing 628's anti-discrimination prohibition, all cable programming services are "like" services.[147] The second part of the Section 202 analysis, allowing a cost-based analysis of price differentials, is consistent with the defenses allowed by Congress for price discrimination: (c)(2)(B)(ii) allows programmers to use different prices, terms and conditions for actual and reasonable differences in the costs of creation, sale, delivery, or transmission; and (c)(2)(B)(iii) allows programmers to set different prices/terms/conditions which take into account economies of scale, cost savings, or other economic benefits reasonably attributable to the number of subscribers served by the distributor. However, this option falls short in that while the statutory exemptions focus on the direct costs of the programmer associated with providing the service to different distributors, there are other narrowly defined, objective factors such as volume discounts based on the number of subscribers served by the distributor that are also justifiable under the statute (that are not cost-based).[148]

42. USTA supports use of variation of 202 because it offers more flexibility, and could encompass aspects of antitrust standards. They argue that differing prices for the same or functionally equivalent programming would automatically raise a question of reasonableness and burden must shift to programmer to justify. Moreover, USTA believes that the burden should be heavier than under 202 because there is no opportunity to review tariffs, and enforcement is strictly through complaint process. They claim that the mere presence of other programming cannot be expected to minimize risk of discrimination as it would in Title II context where pure transport options exist, and a distributor may not be able to duplicate programming option. Therefore, USTA contends that the Commission must actively seek information necessary to assure that contracts are based on neutral, rational factors. U.S. West also supports a standard similar to Section 202 in combination with a reasonable region for price differences. They argue that the other options are untested in this marketplace and could add uncertainty; precedents and experience can provide certainty and predictability. Conversely, the Commission has experience in applying the 202 standard to vendors in the context of filing tariffs, and more recently in discrimination inquiry

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146 See ACC at 9-10; Bell Atlantic at 6-7.

147 See DirecTv at 23.

148 Id. at 24.

regarding satellite retransmission of "superstations" and network programming.[149] US West also claims that programmers should not be allowed to avoid likeness by unreasonable bundling or packaging video programming. If likeness is found and prices and terms and conditions differ, it would be sufficient to establish discrimination. According to US West, unlawful discrimination would also depend on whether differences related to justifying factors. Furthermore, they claim that program vendors should be encouraged to develop pricing matrices reflecting differences in the presence of justifying factors, and that complaints should be dismissed in the absence of a showing that terms of pricing matrix are unreasonable.[150] ACC supports the use of Section 202 standard with Commission specifically defining cable, DBS, wireless cable, MMDS and perhaps others as "like" services to prevent the argument that certain services are not like.

43. Several commenters rejected Section 202 as an appropriate standard because, for example, Section 202 is based on statutory definitions. Furthermore, they claim that it is unnecessary to determine "likeness" as because all discrimination is unlawful.[151] TCI and NCTA state that Congress didn't intend to import common carrier concepts into the video programming business, and Time Warner asserts that the only virtue of using Section 202 as a model is that the FCC is familiar with applying this standard.[152] NRTC addresses the question of like services and states that the Commission could easily find that HSD and non-HSD distribution services are "like services", and any differences in services do not appear to be material functional differences from the customer's perspective, such that Congress created one class of MVPD entitled to protection from discrimination. In this regard, NRTC claims that the definition of a "distributor" includes, but is not limited to, a cable operator, an MMDS service, a DBS service and a HSD satellite program distributor.[153]

3. Antitrust Standards

44. We also proposed to apply price discrimination aspects of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.[154] Most commenters

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149 See Second Report in Gen. Docket No. 89-88, 6 FCC Rcd 3312 (1991).

150 See U.S. West at 13.

151 See NRTC at 21.

152 See Time Warner at 14; TCI at 18; NCTA at 31; accord ACC at 9-10; Bell Atlantic at 6-7; NYNEX at 11; WCA at 39.

153 See NRTC at 26-29.

154 These statutes prohibit any person engaged in commerce from discriminating "in price between different purchasers of commodities of like grade or quality...where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce." See Clayton Act (1914), 15 U.S.C. §§ 12 et seq., 44; Robinson-

oppose the proposal to base the implementing rules for Section 628 on antitrust standards.[155] Although NCTA agrees that the Robinson-Patman Act is similar to Section 628 in some respects, they believe that the antitrust statute differs in its underlying purposes as well as in the criteria for determining whether differentials are justifiable.[156] Several parties, including alternative MVPDs, argue that Congress intended that the 1992 Cable Act should provide a remedy that goes beyond the price discrimination provisions in antitrust law.[157] In particular, these parties claim that under Section 628(c)(2)(B), discriminatory terms are presumed unlawful unless justified under one of the four exemptions, while under the Robinson-Patman Act, price discrimination is prohibited only where its effect may "substantially lessen competition." The commenters also doubt that antitrust analysis, as applied to goods or commodities under Robinson-Patman cases, could extend to services. Superstar observes that the market for video programming services is extremely competitive, such that applying an onerous standard based on antitrust principles would harm satellite broadcast programming vendors due to the ease of entry in the market, thus distinguishing the programming context from Robinson-Patman cases.[158] The Attorneys General state that the "meeting competition" defense developed in the Robinson-Patman context makes little sense in this context where one programming service is not necessarily perceived as a substitute for another. As a result, programming vendors use price discrimination to prevent competing distributors of "cable" programming from offering a comparable product at a comparable price rather than to gain an advantage against sellers of similar products.[159]

4. Price Comparisons as Applied in Other Regulations

45. In the NPRM, we also sought comment on the applicability of principles for price comparison from other areas of federal regulation, including the "anti-dumping" standards of the International Trade Administration. DirecTv stated that this option is undesirable because (1) it is normally applied where prices are artificially lowered for competitive

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Patman Act (1936), 15 U.S.C. §§ 13, 13a, 13b, 21a.

155 TCI expresses general problems with applying a standard based on the Robinson-Patman Act, recommending that the Commission should neither (i) adopt secondary-line injury cases as a model, nor (ii) use precedent from Morton Salt to punish programmers for entering into long-term contracts. They state that the Commission could use cases where, given a large number of sellers, competitive harm is not shown merely because one competitor receives a more favorable price. See TCI at 15.

156 See NCTA at 25; NCTA Reply at 31.

157 See, e.g., DirecTv at 22; WCA at 38-39; NRTC at 22.

158 See Superstar at 58-60.

159 See Attorneys General at 11.

advantage, whereas alternative distributors competing with cable are subjected to artificially high prices, and (2) this type of analysis is cumbersome to apply, typically involving calculations concerning global and national markets and valuations of barriers to trade.[160] Several other commenters, including NCTA, NRTC, and WCA, also object to applying the anti-dumping analysis because the policy contexts of communications and international trade are too different, although WCA concedes that the model could offer helpful analogies.[161]

D. Justifying Factors for Price Differences Specified Under Section 628

46. Certain MVPDs caution that the Commission shouldn't allow consideration of justifying factors to undermine prohibition of discrimination and thwart enforcement efforts. Instead, they claim that the Commission should abide by legislative intent and not allow loopholes or excuses.[162] Unless the vendor can specifically demonstrate some added cost associated with delivery of a program, these parties argue that multichannel distributors should have access at the same price.[163]

47. SCP vendors assert that the comments establish there are many reasonable grounds for price differentials based on delivery systems based on (1) programmer's costs in selling and marketing its services to distributors with different number of subscribers or which use different technologies, (2) the value distributors can confer upon programmers by providing large numbers of subscribers over which programming costs can be amortized, and (3) the distributor's role in marketing an promoting the service.[164] ARC states that clearly justifiable differences that fairly may be reflected in prices, terms and conditions include: advertisers refusal to include HSD subscribers in total viewership for purposes of calculating advertising payments; large-volume distributors cost less to service and provide additional economic benefits through increased advertising revenues and widespread promotion and recognition of a service; programming services face different competition conditions with different distributors and in different geographic regions.[165] Prime Ticket describes pricing practices unique to sports programmers and states that it uses volume discount and price differentials based on geographic locations.[166]

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160 See DirecTv at 22.

161 See NRTC at 23; DirecTv at 22; WCA at 39; NCTA Reply at 32-33.

162 See NTCA at 3-4.

163 See ACC at 8 (stating that no actual expense difference exists to justify price difference between cable and DBS).

164 See Turner Reply at 7 (citing Viacom at 18).

165 See ARC at 15.

166 Prime Ticket's programming consists of professional and college sports teams from the Los Angeles area that it contends are not as valuable outside

1. Cost differences

48. SCP and SBP vendors assert that they incur greater costs with service to certain MVPDs, especially with respect to HSD distributors, and that Section 628 allows for recognition of these costs in different pricing practices. EMI stresses that the Commission must permit a vendor's prices or terms to reflect the varying costs of providing the service and the value of a distributor's commitment to a programming service[167] as well as numerous factors, not limited to those set out in the statute, such as copyright royalty payments to the U.S. Copyright Office, which it does not incur in its cable business. Accordingly, EMI states that these costs must be allocated fairly to HSD customers, not cable or MMDS customers.[168] Superstar states that it is difficult to identify all appropriate cost and economic benefit factors, which may preclude an objective standard for discrimination if the Commission seeks to avoid restricting normal business processes. Superstar claims that actual and reasonable cost differences include more marketing costs that benefit all distributors by encouraging consumer awareness and desire for programming. Superstar also points out that the differences include (1) more and different back office costs involving thousands of operations, consumer problems, and 24-hour customer service, (2) different operations conducted through GI's DBS Center including maintaining ports and connections, and (3) piracy costs. They also observe that costs may vary from distributor to distributor, or vendor to vendor, and are not susceptible to mathematical precision.[169] Therefore, Superstar believes that the Commission should allow vendors to exercise reasonable business judgments and only allow complaints against those practices that cause significant harm or those that could be independently considered unfair.

49. UVI offers detailed information regarding cost differences in providing satellite broadcast programming to cable operators as opposed to the HSD market. Satellite broadcast programming vendors (SBPV) provide services for facilities-based operators (FBOs), including cable, SMATV and MMDS, which are distinctly different from those services provided to HSD consumers through non-facilities-based distributors because FBOs maintain facilities and services necessary to deliver signal to consumers.[170] On the other hand, the HSD

Los Angeles. It submits that the lowest contract price within Los Angeles County is twice as high as the highest price outside California. Prime Ticket states that it cannot price the same and cover the cost of the rights fees it has to pay. It asserts that a single rate would not work, and would be either too high to attract customers in outer markets or too low to cover costs.

167 See EMI at 3.

168 Id. at 4-5.

169 See Superstar at 49-50; see also Discovery at 23.

170 See UVI Reply at 7.

distributor functions more as a sales agent than as a vital link in the delivery chain. UVI argues that the fundamental differences between the services provided by a SBPV to serve FBOs and HSD consumers mean that there are significant differences in the costs to provide services.[171] Furthermore, the unique costs of providing services to HSD market must be allocated across a customer base of one million, while the unique costs of providing services to FBOs is spread out a customer base of 30 million, such that on a per subscriber basis, the rates for HSDs are higher than for FBOs.[172]

50. Time Warner asserts that regulations should allow for differences in transaction costs, and programmers costs in marketing the product to subscribers; some distributors perform more for the programmer than others and this should be reflected in price.[173] Similarly, Turner offers evidence to justify a 780% price differential (between cable and TVRO) cited by NRTC on the grounds that the distributors involved are fundamentally different.[174] For instance, Turner must go through a cable operator to reach cable customers while it is able to sell directly to TVRO households, and could reach all of NRTC's customers without NRTC's service. Turner continues that there is no economic reason to sell programming to a cable operator and HSD distributor at the same price, because HSD distributors act solely as middlemen, do not build physical pants to increase penetration rates, do not help create a mass audience which advances advertising objectives, do not commit resources to marketing, and involve higher administrative costs, incidence of signal theft, and maintenance cost.[175] Time Warner states that the law does not protect individual HSD subscribers, only distributors, although selling to individual HSD owners is more costly. For instance, HBO has chosen to transmit an analog signal which is able to be unscrambled by less expensive decoders on HSD systems instead of a compressed digital signal, although some cable headends may not have digital capability either, which costs HBO $3 million annually. Furthermore, HBO activates a cable descrambler once for many subscribers, but each individual HSD must be separately addressed.[176] SBCA, an organization representing programmers and distributors, agrees that service to MVPDs, particularly the HSD market, results in different costs.[177]

51. Some alternative MVPDs argue that there are no differences in the costs of serving them as opposed to other distributors. For example, NSPN states that the Commission should not allow geographic exceptions and that

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171 Id. at 8.

172 Id. at 9.

173 See Time Warner at 23.

174 Cf. NRTC at 4-5.

175 See Turner at 10; Turner Reply at 8; see also Liberty Media at 37.

176 See Time Warner at 24-27.

177 See SBCA Reply at 6.

there is no reason for cost differences to serve different areas of country.[178] CSS argues that the application of permitted priced differentials in the case of NPS should not result in any significant pricing differences between NPS and a cable operator, SMATV provider or wireless cable operator of similar size. No cost based differentials are justified between NPS and a comparably sized cable system.[179] However, the costs of serving NPS by a programmer is, in many cases for many programmers, equal to or possibly less than the costs associated with serving an MSO of equal or lesser size. Likewise, Souris River suggests that price differences between HSD and cable are unjustified and that it costs no more to serve rural HSDs than urban cable.[180]

52. Programmers urge that the Commission consider costs incurred by distributors at the retail level in serving subscribers in determining an appropriate price. EMI wants the Commission to establish that vendors may legitimately recognize the added value certain distributors add to a programming distribution arrangement. For example, certain types of distributors, such as cable and MMDS operators, incur significant costs to create and maintain delivery systems.[181] EMI states that the legislative history supports that price differentials may be justified by costs associated at both the program vendor's level and at the distributor's level.[182] Similarly, Viacom states that the colloquy between Senators Kerry and Inouye supports the fact that because these costs can be considered, it is clear that the intent of Congress was to protect competition and not particular competitors.[183] Viacom also claims that non-cable distributors have lower costs per subscriber to deliver to the home and may undercut cable's retail price regardless of the price for programming.[184]

53. WCA opposes the arguments to consider retail costs of distributors on the grounds that there is no support in Section 628 for this position, nor do the 3 committee reports in legislative history, but rather that the advocates of this argument rely only on a colloquy between Senators Inouye and

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[178] See NSPN at 9 n.6.

[179] See CSS at 16.

[180] See Souris River at 2.

[181] See EMI at 6.

[182] Id. at 10; see also Rainbow at 7, Liberty Media at 25-26.

[183] See Viacom at 16. Cross County attacks as inadequate Viacom's assertion of a cable competitor's lower cost structure. Viacom counts franchise fees but not channel lease fees for wireless, says that lower costs are not a reason to charge more. It asserts that wireless does have somewhat lower fixed costs but it can't withstand indefinitely discrimination. Cross Country Reply at 5 n.3.

[184] Id. at 52; see also Discovery at 24.

Kerry.[185] WCA asserts that this colloquy is ambiguous, and permitting programmers to charge higher fees to distribution technologies with lower costs will discourage development of new, low cost technologies, counter to congressional goals, "in promoting a diversity of views provided through multiple technology media".[186] WCA argues that wireless technology can offer lower rates to subscribers because of its more efficient distribution technology. Similarly, Bell Atlantic states that a buyers' costs should only be relevant if they have demonstrable impact on sellers' costs.[187]

2. Volume

54. In general, programmers strongly support the allowance of price discounts based on subscriber volume.[188] Rainbow states that its price may depend on relative efficiencies of the distributor, and that price is a function of a distributor's penetration in market and the number of subscribers that actually take the service (HSD rates reflect vastly lower penetration).[189] Commercial-free programming services place a higher value on cable distribution, arguing that cable provides access to more households at a lower transaction cost.[190] According to TCI, discounts based on the number of subscribers are permissible and longstanding business practices that Congress intended to allow. TCI asserts that volume discounts bring economic benefit to advertiser supported programmers, and can increase diversity of programming and channel capacity and can lower consumer rates.[191] Turner states that an HSD distributor like NRTC provides 62,000 CNN customers out of 92 million TV homes nationwide, and is not as critical as a cable operator which provides 62,000 customers in a city with 90,000 TV homes.[192] Turner also states that the Commission should adopt a presumption that volume discounts within a certain range are legitimate; it asserts that an upper limit of 20% would be reasonable.[193]

55. Small System Operators submits that eliminating volume discounts would not serve to reduce programming costs for small operators, but would only raise costs for larger ones. Through a system of rebates or other practices,

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185 See WCA Reply at 20.

186 Id. at 23, n. 51.

187 Bell Atlantic at 6.

188 See E! at 9; ESPN at 5; Discovery at 21; Landmark at 18.

189 See Rainbow at 8.

190 See Superstar at 51.

191 See TCI at 18-19.

192 See Turner at 11.

193 Id. at 13.

they submit, it is likely that volume discounts for large operators would continue to exist.[194] CATA states that programmers may have very legitimate bases for volume discounts, especially with advertiser supported programming. CATA asserts that a guarantee of a minimum number of subscribers may mean the difference between getting and losing an account.[195] UVI contends that without volume discounts, any large MSO could uplink a particular superstation rather than obtain the signal from UVI or another vendor.[196] UVI further argues that volume discounts do not significantly decrease a facilities based operator's total costs, as programming costs represent 36% of such an operator's total monthly costs. UVI submits that volume discounts for superstations do not hinder program distribution to consumers and thus cannot be considered a violation of the statute.[197]

56. In a study appended to the comments of TCI, Charles River Associates opposes a blanket prohibition on the use of volume discounts. Charles River submits that transaction and selling costs per subscriber are likely to be lower when a program service can deal with, for example, a single MSO that represents 10 million subscribers rather than 10 distributors, each of whom can deliver 1 million subscribers, or 40 operators with 250,000 subscribers each. Moreover, Charles River argues, a large MSO will incur some of the cost of communicating with individual systems that the program service itself must bear when dealing with small systems. Charles River asserts that volume discounts can promote the efficient distribution of programming, enabling large MSOs to supply their subscribers with more services or to set lower prices, causing more consumers to subscribe to services carried by the multichannel distributor. Further, Charles River contends, lower programming costs may increase the channel capacity that a cable system chooses to provide, and may contribute to the viability of some programming services due to increased distribution. In addition, Charles River notes that it should not be presumed that lower fees based on cost efficiencies are available to only one distributor in a market. Charles River asserts that the competitive edge gained by a low-cost supplier is the incentive the market uses to encourage all firms to adopt techniques and procedures that reduce costs, to the benefit of consumers.[198]

57. E! contends that the statute recognizes the legitimacy of some price differences attributable to the number of subscribers, and submits that it experiences economies of scale when dealing with large distributors as opposed to small distributors, and cable as opposed to non-cable distributors[199]. Superstar states that absent evidence that a vendor is using

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194 See Small Systems Operators at 9.

195 See CATA Reply at 2

196 See UVI Reply at 9.

197 Id. at 10.

198 Charles River Study at 6-10.

different prices to deny access, the Commission should presume that negotiated prices reflect relative direct and legitimate economic benefits attributable to the number of subscribers served. It asserts that economies of scale are difficult to measure at different levels of subscribership. It also contends that quantification may change with the economy, interest rates, availability of capital, and other factors, and that the extent may change with growth of markets, presence of competing programming and success of programming sold.[200]

58. Viacom states that volume discounts are not uniform for each technology because cable can deliver vastly more customers.[201] Viacom further cites additional expenses associated with noncable distributors; they argue, for example, that SMATV subscribers are more susceptible to churn because they live in apartments. Liberty Media suggests that the Commission should generally identify those kinds of "economic benefits" that would justify discounted rates.[202] Bell Atlantic agrees that economies of scale have to be cost justified, citing the legislative history where the current exception replaced language allowing for straight volume discounts.[203]

59. Many vendors assert that their volume discounts are not discriminatory because they are offered to all distributors. NSPN cautions, however, that artificially high subscriber counts can be used to qualify for volume discounts, and urges the Commission to set meaningful levels.[204] CSS does not take issue with the ability of a programmer to offer reasonable, cost based volume discounts, but it urges the Commission to establish rules and remedies to permit a competitive MVPD to demonstrate that there are no justifiable differences between itself and a cable system or SMATV operator of a comparable size.[205] TCI states that the Commission should prohibit price differences between technologies based solely on the technology and unrelated to cost and other legitimate factors (e.g., signal security, financial stability).[206]

60. On the other hand, CableAmerica contends that volume discounts are unfair to smaller systems.[207] CableAmerica asserts that Congress chose not to

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199 See E! at 8-9.

200 See Superstar at 50; see also Time Warner at 23-27, Viacom at 16.

201 See Viacom at 41.

202 See Liberty Media at 21.

203 See Bell Atlantic at 7.

204 See NSPN at 14.

205 See CSS at 17.

206 See TCI at 22.

207 See CableAmerica at 7-8.

give programming vendors total discretion in granting volume discounts to larger operators, and argues that there is little economic basis for volume discounts.[208] CSS urges that the rules should not permit any volume discounts based upon subscribers obtained through a different delivery medium unless it can be shown by clear evidence that the subscriber base in one delivery medium provides direct cost savings in the provision of programming for another delivery technology. It submits that such an additional subscriber base may be accounted for by the cost and term advantages afforded to cable providers during the past several years.[209] DirecTv states that vendors should not be allowed to aggregate subscribers across technologies -- i.e., an MSO with DBS interests should not be allowed to combine to obtain greater volume discounts.[210]

3. Creditworthiness

61. ACC states that vertically integrated program vendors cannot be allowed to unilaterally determine the creditworthiness of a potential multichannel competitor. Rather, where questions of creditworthiness are raised, the Commission could permit program vendors to require multichannel distributors to provide some reasonable evidence of an ability to pay.[211] DirecTv states that the statute allows financial stability conditions as long as they are imposed evenhandedly on all MVPDs.[212] Liberty Media asserts that additional financial requirements should be permitted for distributors which: have a poor credit history, have a poor history of customer service and satisfaction, and employ new distribution technologies, the quality of which is unproven.[213] People's Cable, which operates a cable system and a wireless cable system, describes how some programmers charged higher rates and demanded additional credit guarantees for programming to be sold on the wireless system despite the fact that both systems were operated by the same company.[214] Superstar submits that a vendor should be permitted to take into account payment history, commercially available credit information, the value of a distributor's assets, and additional assurances if it is uncertain that it will receive timely payment.[215] Viacom states that there is a greater financial risk with alternate distribution technologies.[216]

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208 Id. at 27-28.

209 See CSS at 11.

210 See DirecTv at 23.

211 See ACC at 7.

212 See DirecTv at 25.

213 See Liberty Media at 39; see also Time Warner at 20-23.

214 See People's Cable Reply at 2-3.

215 See Superstar at 47-48.

4. Offering of Service

62. Commenters discuss a variety of other factors related to offering of service that might affect the price of programming. For example, Continental suggested that the following factors have a material impact on the price: (1) the distributor's penetration levels for premium programming; (2) the marketing resources devoted to promotion of premium programming by the distributor; (3) the markets served by the distributor; (4) channel positioning; (5) the size of the distributor's subscriber base; (6) the addressability of the distributor's system; and (7) the retail price charged to the consumer.[217] Other commenters offered similar offering of service factors such as introductory terms and marketing support;[218] risk of taking a new service, differences in meeting competition, different value in geographic areas, different competition for carriage;[219] packagers of programs, contract duration;[220] appropriate commitment to marketing and distribution of service;[221] prepayment discounts, promotional programs;[222] discounts to distributors with lower retail costs;[223] and channel placement.[224]

63. Bell Atlantic cautions that the Commission should be careful in allowing differences based on marketing abilities or name recognition. It asserts that the cable operator can always claim name recognition over a new entrant, and that cable operators should not be entitled to credit for marketing performed greater than its actual costs.[225] DirecTv states that offering of service conditions must be technology neutral and available to all MVPDs.[226] Rainbow urges a broad construction of "offering of service" and asserts that the vendor needs to ensure that the distributor makes the appropriate commitment to marketing and distribution of service.[227]

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216 See Viacom at 17.

217 See Continental at 11-20.

218 See Turner at 11; Discovery at 22.

219 See Liberty Media at 35-37.

220 See DirecTv at 25.

221 See Rainbow at 9.

222 See Attorneys General at 10.

223 See People's Choice Reply at 2.

224 See E! at 9.

225 See Bell Atlantic at 7.

226 See DirecTv at 22.

64. Superstar states that it is impossible to quantify justification factors because they will vary from vendor to vendor. For example, Superstar argues, HSD distributors often collect yearly fees but pay the programmer monthly. It also asserts that programmers sell programming with conditions allowing for prepayment discounts, performance discounts and other bonuses tied to the conduct of a particular distributor. Therefore, Superstar argues that the only feasible discrimination standard would be an absolute price differential based on current practice.[228] Time Warner states that because HSDs can receive five versions of HBO, can block programming based or ratings and can get a menu displaying program information, the programmer should be allowed to charge a higher price.[229] Viacom states that pricing standards should allow for the different marketing abilities of distributors, asserting that factors that bear on negotiations include the distributor's subscriber base, a programmer's agreement to tailor incentives for that particular distributor to reach a certain number of subscribers, the distributor's number of current and anticipated subscribers to the service, the retail price set by the distributor, penetration of service, amount and type of marketing, channel position, agreements to launch the service in particular markets, timing of launches, duration of the agreement, the extent of available channel capacity, and revenue or subscriber guarantees.[230]

E. Other Pricing Factors Suggested by Comments

65. ARC asserts that concentric pricing of sports programming cannot be regarded as unfair or discriminatory because it promotes rather than hinders distribution and diversity. It also asserts that it may make price adjustments for cable, MMDS and SMATV operators in areas for which the service's distribution rights for one or more of the teams are restricted. It contends that price differentials resulting from such licensing restrictions are neither unfair nor deceptive and should not be considered discriminatory under Section 628.[231]

66. Charles River asserts that introductory discounts may also lead to pricing differences. Introductory discounts are the better prices and terms offered to distributors that commit to a new service before that service is introduced. These early signers are given a discount in exchange for bearing the risk of not being able to recover costs for launching the service or for launching a replacement service. They also bear the risk that the service will not be successful, causing distributors that sign later to pay less.[232]

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227 See Rainbow at 10.

228 See Superstar at 48-49.

229 See Time Warner at 26.

230 See Viacom at 45.

231 ARC at 10-14.

In addition, Charles River contends that non-uniform pricing schedules may cause pricing differences. By non-uniform pricing schedules, Charles River refers to pricing based on the fact that a program service incurs relatively low additional costs when more distributors carry its service, or when more subscribers to systems already carrying the service sign up. Charles River notes, for example, that if a program service has average costs per subscriber of 50 cents per month but the cost of being distributed to an additional subscriber is only 1 cent, setting the price at a uniform 50 cents per subscriber might restrict distribution of the service in areas where its value to the system and to subscribers is less than 50 cents per subscriber but more than 1 cent. Charles River submits that there are many types of non-uniform schedules, but all are similar in that the amount by which the total license fee increases when one more subscriber receives the service is smaller than the average license fee paid per subscriber.[233] Further, Charles River contends that signal security issues, collection problems and the overall value of contract terms to individual distributors may cause pricing differentials.[234] On the other hand, WCA argues that programmer's standards relating to signal quality and piracy must be applied on technology-neutral basis.[235]

F. Buying Groups

67. Most commenters agree that buying groups perform a useful function and should receive the benefits of discounts based on subscriber volume. NSPN submits that a buying group offers more efficiencies, less overhead and more economic value to members, as well as a larger subscriber count and fiscal responsibility that programmers may require. It often acts as the direct licensee of a programmer and will absorb bad debt problems, and helps newer, smaller companies get started.[236] Discovery states that group-buying discounts are a form of volume discount expressly permitted by the Act.[237] CSSO argues that the Commission should not hinder the development of co-ops or buying groups for small operators and should not impose requirements or restrictions on buying groups because the impact of any such regulation would likely be disproportionately felt by small operators. It contends that small systems must be given the opportunity to purchase programming at a fair price and on equal ground with larger operators.[238] Conversely, NCTA states that Section 628 does not provide that buying groups can demand the same prices

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232 Charles River Study at 12-13. For a discussion of pricing dynamics in establishing introductory discounts, see id. at 14-16.

233 Id. at 17-20.

234 Id. at 20-25.

235 See WCA Reply at 24.

236 See NSPN at 1-8.

237 See Discovery at 21.

238 See CSSO at 6.

as other distributors, simply on the basis of the numbers of subscribers served, and argues that all the factors that justify differential prices among other distributors also apply to buying groups.[239]

68. Programming vendors supporting the concept of buying groups also assert that in order to receive benefits, such groups should agree to unitary treatment. For example, Time Warner would require that the group agree to be liable for the debts of any member, that each member agree to be liable for the debts of the group and each other member, that each member guarantee the technical performance and signal security of each other member, and that the group show that it can provide the same efficiencies as and individual entity, i.e., ability to make collective distribution and marketing decisions for all members).[240] United Video states that uncontrolled buying groups would undermine the overall rate structure and reasonable volume discounts. It asserts that such groups should be permitted only where a single entity owns at least 51 percent of each member of the group, and that limits should be placed on the size of individual members and on the overall size of the group. United Video further argues that the group should be required to agree to unitary treatment, such as centralized billing, uniform contract provisions, joint and several liability and indemnification.[241] Viacom asserts that if a buying group actually performed the same functions and offered the same benefits as an MSO it would be entitled to comparable treatment.[242] Liberty Media states that in order to obtain the benefits of group purchases, members of buying groups also should be required to accept unitary treatment, i.e., the same non-price terms and conditions. Likewise, it argues, members of buying groups should be jointly and severally liable for the commitments of the group. Liberty Media submits that it does not appear necessary now to limit the size of individual entities participating in buying groups provided that the total number of subscribers represented by the group does not exceed whatever horizontal concentration limits are established by the Commission pursuant to Section 11 of the Cable Act.[243]

69. NSPN opposes programmers' suggestions that members of a buying group must have a common marketing plan and joint and several liability for programming fees, technical performance and signal security before the group can obtain protection under 628.[244] It disagrees with programmers' arguments that all members of the group must have a common marketing program and joint and several liability for programming fees, technical performance and signal

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239 See NCTA at 39.

240 See Time Warner at 31.

241 See UVI at 29.

242 See Viacom at 27.

243 See Liberty Media at 40.

244 See NSPN at 1.

security. It contends that the buying group and not its individual members should be responsible for programming fees as a party to the contract. Further, NSPN contends that Section 628 and its legislative history do not require buying groups to become MSOs, and neither the group nor its members should have to assume legal responsibility for one individual member's technical problems. NSPN also claims that it is unrealistic to require uniform marketing strategies.[245]

G. Non-Price Discrimination

70. MVPDs offer a variety of examples that they say should be included as discriminatory practices. NSPN argues that these include identifying non-cable providers as "special markets" and limiting ability of purchasing agents to serve special markets.[246] NSPN also contends that the regulations should outlaw "most favored nations" clauses and grandfathering because such provisions are not available to alternate providers.[247] CSS suggests a number of non-price-based practices that constitute unfair treatment, including restricting the contents of an MVPD's basic tier; requiring an MVPD to sell subscriptions only on an annual basis; refusing or unduly limiting MVPDs' tier bit access; and refusing to permit MVPDs to sell certain programs in cabled areas while permitting other cable affiliated HSD providers to provide such service.[248]

71. National CableSystems Associates notes that unaffiliated distributors sometimes have to obtain the programming of vertically integrated vendors through third party distributors that charge higher rates and exact more concessions than the vendors do themselves.[249] CableAmerica notes that some programming vendors support cut-rate promotions by favored cable operators, but that programmers often refuse to extend these same promotional opportunities to competing video distributors.[250]

72. CATA submits that examples of discriminatory terms and conditions that program services with predominant market shares impose on smaller operators include: program suppliers place conditions in their contracts that provide strong disincentives for an operator to carry less than the full panoply of their services; program suppliers heavily penalize operators that do not carry the service on the lowest tier of available programming; program suppliers force operators to pay for the service based on the total number of subscribers the operator has rather than the number of subscribers that receive

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245 See NSPN at 14.

246 Id. at 8.

247 Id.

248 See CSS at 15-16.

249 See National CableSystems Associates at 4.

250 See CableAmerica at 24.

a particular service; program suppliers require that operators carry their service only on VHF channels to the detriment of other services. CATA asserts that these discriminatory prices, terms and conditions may be necessary to promote diversity or may be justified by unique market considerations.[251]

73. Time Warner opposes commenters that argue the Commission should make it unlawful for a programming vendor to refuse to deal with an MVPD. Time Warner argues that a seller has the right to refuse to do business under antitrust law, and contends that nothing in the statute requires such a rule. It also asserts that such a rule might violate the First Amendment.[252]

III. Exclusive Contracts

74. A number of commenters favor the continued use of exclusive contracts. Liberty Media urges the Commission to confirm that exclusivity is a legitimate means of competition.[253] NCTA contends that courts, economists and antitrust experts have recognized that most exclusive contracts promote competition and consumer welfare and thus promote the public interest. NCTA states that antitrust precedents provide the most relevant and well developed standards, and suggests that so long as there is a competitive market and there is no concerted refusal to deal with particular network distributors, an exclusive contract between a programmer and a cable operator is highly likely to promote competition and serve the public interest.[254] Citing the FCC's syndicated exclusivity rules, TCI contends that exclusivity encourages the creation and distribution of alternative programming, thereby increasing diversity.[255] TCI adds that a further benefit of exclusivity is that it prevents potential competing distributors from "free riding" on the promotional efforts of the first distributor.[256] Discovery Communications argues that those commenters calling for a rigid ban on exclusive programming arrangements have failed to refute that procompetitive benefits result from exclusive dealing, as the Commission itself has noted.[257]

75. Charles River asserts that exclusive contracts can produce substantial efficiencies that benefit consumers and argues that the Commission should limit such contracts only if there is demonstrable harm to cable viewers. Charles River notes that program services will sell the exclusives

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251 See CATA at 5-6.

252 See Time Warner at 11.

253 See Liberty Media at 47.

254 See NTCA at 48.

255 See TCI at 25.

256 Id. at 24.

257 See Discovery Reply at 14.

only if they are compensated for the net revenue they forego from other distributors by selling the exclusive. Charles River further submits that exclusive contracts are sometimes profitable due to factors such as decreased transaction costs and the avoidance of signal security and collection problems. Charles River also asserts that an exclusive contract means that fewer parties will be absorbing risk, and contends that exclusivity gives a distributor a greater incentive to promote the service and avoids the problem of other distributors "free riding" on one distributor's promotion of the service.[258]

76. Conversely, U.S. West states that the Cable Act provisions indicate that Congress viewed exclusive contracts as barriers to entry and contrary to its competitive goals.[259] Others agree that Congress has determined that exclusive contracts harm competitors, and should only be allowed in limited circumstances.[260] For example, Provo Cable argues that all exclusive contracts should be eliminated.[261] City of Manitowoc adds that Congress has determined that exclusive contracts are generally harmful, and that competitors need not make any further showing of harm to bring a complaint before the FCC.[262]

A. Section 628(c)(2)(C)

77. Several commenters argue that because Section 628(c)(2)(C) does not include a public interest analysis, exclusive contracts with a cable operator in an unserved area are a per se violation of the Act.[263] Further, Direct TV argues that if an MVPD complains that it cannot obtain programming rights from a particular vendor, that vendor should be required to submit all of its contracts covering the affected area for FCC review to determine if any exclusive arrangements exist.[264] Other commenters argue that an exclusive contract in an unserved area is only unlawful if a complainant establishes that it has caused competitive harm to the complainant.[265] Cablevision argues that those who summarily conclude that Section 628(c) prohibits exclusivity in unserved areas have ignored the mandate of Section 628(b) to increase the availability of programming to those areas, and that programmers should be allowed to grant exclusive rights to any MVPD that is the first to provide video services to an unserved area.[266]

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258 Charles River Study at 26-39.

259 See U.S. West at 8.

260 See TRAC at 3; Manitowoc Reply at 4.

261 See Provo Cable Reply at 1.

262 See Manitowoc Reply at 13-14.

263 See Direct TV at 27; Attorneys General at 12; NPCA at 25; NRTC at 28; ACC Reply at 5.

264 See DirecTv at 28.

265 See Time Warner at 38; NCTA at 40.

78. Several commenters also state that the "area served by a cable operator" should be wherever a cable system actually passes a home, or wherever a home can be connected to the cable system for a standard connect fee.[267] The Coalition of Concerned Wireless Operators believe that it should be defined as any area in which subscribers can be connected to either a wired or wireless system.[268] The Attorneys General, however, state that because subsections 628(c)(2)(C) and (D) specify areas served or not served "by a cable operator," any analysis of areas served or not served by other types of distributors is irrelevant.[269] Time Warner argues that an "area" should encompass the entire territory of a political subdivision that possesses the authority to enter into a franchising agreement with a cable operator.[270] It further argues that a home-by-home analysis would lead to an administrative nightmare for all parties involved, and a bright line test is needed.[271] GTE, however, believes that unbuilt portions of franchise areas must be considered "not served," and that such a view will provide a slow building operator an incentive to complete franchise construction to gain the benefits of Section 628(c)(2)(D), or will provide overbuilders or other multichannel competitors with incentives to serve unserved areas unhindered by exclusive programming arrangements.[272]

79. Further, NYNEX believes that Section 628(c)(2)(C) imposes upon satellite broadcast programming vendors and vertically integrated satellite cable programming vendors a duty to deal with non-affiliated programming distributors.[273] Time Warner, however, contends that the statute does not impose such a duty, and that if Congress had intended to impose upon programmers a duty to deal, it would have done so explicitly.[274]

80. In addition, Discovery argues that regulations promulgated to implement Section 628(c) should apply not just to contracts specifically designated "exclusive," but to all contracts that "have the effect of an exclusive contract," such as a substantial rate differential that has the same effect as exclusivity.[275] Similarly, WJB contends that the Commission's

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266 See Cablevision Reply at 5.

267 See Direct TV at 28; Attorneys General at 12; NPCA at 26; NRTC at 28.

268 See CCWO at 4.

269 See Attorneys General at 12.

270 See Time Warner at 36-37.

271 See Time Warner Reply at 18.

272 See GTE Reply at 8.

273 See NYNEX at 13.

274 See Time Warner at 41-42.

regulations should define "exclusivity" sufficiently broadly to include a scenario in which a vendor offers a contract to both an affiliated and a non-affiliated MVPD, but the contract offered to the non-affiliated MVPD contains significant restrictions not contained in the contract offered to the affiliated MVPD, effectively giving the affiliated MVPD "exclusivity."[276] Time Warner suggests that the Commission should not, at this time, exercise its authority under Section 628(c)(2)(C) to regulate practices other than exclusive contracts.[277]

81. The Coalition of Concerned Wireless Cable Operators suggests that time-delay agreements and prohibitions against distributing programming within the service area of a wired cable operator should be prohibited.[278] Discovery, however, argues that vendors should be able to offer certain preferences such as time-delay provisions as an inducement for MVPDs to market the programming.[279]

82. With respect to subdistribution agreements, NPCA contends that franchised cable operators often exploit subdistribution rights to the detriment of SMATV operators by using the rights to restrict access or to impose unfair conditions on SMATV operators seeking program access. Thus, they argue, if the Commission does not prohibit the use of subdistribution agreements (as an "other practice" under Section 628(c)(2)(C)), it should impose restrictions on the provisions of such agreements. NPCA suggests that the Commission prohibit a subdistributor from tying programming rights to the purchase of other programming or to access rights to private property. It argues that other terms should be directly related to "subdistribution itself" and that rates should be regulated. NPCA further contends that cable subdistributors should be prevented from "stonewalling" by a requirement that they respond to a request for programming within a specified time period, such as 15 days. If the cable operator denies a request for subdistribution, NPCA argues, the MVPD should be permitted to purchase directly from the programmer.[280]

83. Time Warner argues that cable operators are ideally positioned to act as subdistributors because of their local presence and billing apparatus, and should be permitted to do so.[281] Moreover, Time Warner argues, a subdistributor can take into account "free riding" and piracy concerns within

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275 See Discovery at 27.

276 See WJB at 16.

277 See Time Warner at 38.

278 See CCWO at 4.

279 See Discovery at 28.

280 See NPCA at 19-20.

281 See Time Warner at 40.

its own service area through its subdistribution rates.[282] Time Warner asserts that even if the Commission were to prohibit subdistribution agreements, it could only do so for unserved areas pursuant to Section 628(c)(2)(C), which does not include the public interest test.[283] Moreover, it submits, Section 628(c)(2)(C) requires that the practice "prevent" -- i.e. "make altogether impossible" -- a distributor from obtaining access to programming, not merely restrict or inhibit access.[284] NCTA agrees that practices that "merely restrict" access to programming, such as subdistribution or time-delay, are beyond the scope of Section 628(c)(2)(C). Bell Atlantic responds that there is no foundation in the statute for such an extreme construction.[285]

B. Section 628(c)(2)(D)

84. Many commenters argue that because the statute prohibits exclusive contracts unless the Commission determines that they are in the public interest, the statute requires that the Commission must review and approve all exclusive contracts before they can go into effect.[286] APPA argues that parties would have little incentive to refrain from exclusive contracts if they were subject only to a chance that affected parties might discover the exclusivity and would also be able to spend the time and resources necessary to eliminate them through the complaint process.[287] WCA suggests that all exclusive contracts should be filed at the Commission and placed on public notice for 30 days to allow for the filing of petitions to deny. If there are no petitions to deny, the contract is automatically approved. If there is a petition to deny, the Commission must evaluate the contract under the statutory criteria to determine whether it is in the public interest.[288]

85. Time Warner responds that nothing in the statute suggests that the public interest determination must precede the effective date of the contract.[289] With respect to the concern that MVPDs will not know whether an exclusive contracts exists, Time Warner further argues that if a programming vendor cannot sell to a distributor because of an exclusivity requirement, "it can be counted on to say so."[290] NCTA contends that the statute does not

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282 See Time Warner Reply at 19.

283 Id. at 39.

284 Id..

285 See Bell Atlantic Reply at 7-8.

286 See Bell South at 7; Bell Atlantic at 7; WCA at 43; DirecTV at 28; APPA at 19; TRAC at 4; Manitowoc Reply at 8; People's Choice Reply at 5-6.

287 See APPA at 19-20.

288 See WCA at 43.

289 See Time Warner Reply at 20.

permit prior review, because the Commission is authorized only to order remedies for violations of Section 628 upon completion of an adjudicatory proceeding. Moreover, it argues, only documents that are the subject of a complaint may be compelled by the Commission to be submitted for review pursuant to Section 628(d).[291] Some commenters also contend that a filing or prior approval requirement would be unduly burdensome on the Commission.[292] BellSouth responds that the "evils that the statute is designed to prevent" outweigh any regulatory burden.[293] Cablevision asserts that commenters proposing "this form of micro-management are betting on extensive delays, expense and uncertainty to destroy what the Cable Act did not intend to eliminate."[294]

86. Discovery suggests that programmers should only be required to inform the Commission of the existence of an exclusive contract if a "significant complaint is made."[295] U.S. West contends that a program vendor should be required to reveal the existence of an exclusive contract for a given area upon request by an interested party, and should be required to disclose the parties, the execution date, the effective date, the term (length), the programming covered, the geographic coverage, and any prohibitions or restrictions on sales or relationships with third parties.[296]

87. Commenters suggest various approaches for determining whether an exclusive contract is in the public interest. Direct TV argues that the Commission should adopt a "hard look" approach with a presumption that exclusive contracts are harmful.[297] U.S. West agrees that the Commission should adopt a presumption that exclusive contracts are contrary to the public interest.[298] Manitowoc argues that the burden of proof should always rest on the proponent of exclusivity.[299] CableAmerica states that the Commission may not consider anything other than the four factors listed in the statute to make the public interest determination.[300] USSB states that it would be premature

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290 Id. at 21.

291 See NCTA Reply at 41.

292 See Discovery at 28; NCTA Reply at 41.

293 BellSouth at 10.

294 Cablevision Reply at 5.

295 Discovery at 28.

296 See U.S. West at 10-11.

297 See DirecTv at 27.

298 See U.S. West Reply at 6.

299 See Manitowoc Reply at 8.

to identify "other factors" for the public interest evaluation.[301] The Attorneys General argue that parties seeking to enforce an exclusive contract must make a positive showing that such exclusivity does not preclude effective competition between cable operators and other MVPDs.[302] NCTA responds that nothing in the statute requires a positive showing that an exclusive contract does not preclude effective competition in the retail distribution market.[303] Liberty Cable contends that a "presumption of illegality" for exclusive contracts is the most effective means of prohibiting a cable operator from "coercing" such agreements from a vendor.[304] Even if effective competition exists, the cable operator must show that exclusivity will ensure that such effective competition will continue for the life of the arrangement.[305] TRAC contends that the determination must be made on a case-by-case basis, and that no blanket presumptions can be made.[306]

88. Continental argues that the prohibition against exclusive contracts must be read in conjunction with Congress' focus on coercion in Section 616(a)(2), and that "where neither party has coerced the other" into entering an exclusive contract, there should be a presumption that the contract "merely reflects the free market incentives inherent in exclusive distribution arrangements" and is in the public interest.[307] Discovery argues that there should be a presumption that exclusive contracts are permitted where they have no adverse effect on competition, i.e., whenever there is sufficient alternative programming available.[308] Other commenters agree that exclusive contracts should be permitted when comparable alternative programming exists.[309] TCI contends that exclusive contracts should only be prohibited when they deprive a distributor of a "vital product." If alternatives exist, TCI argues, then "absent truly unique circumstances" a particular program service cannot be deemed "vital" to the distributor.[310] CableAmerica suggests

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300 See CableAmerica at 37.

301 See USSB at 4.

302 See Attorneys General at 13.

303 See NCTA Reply at 41-42.

304 See Liberty Cable at 15.

305 Id. at 16.

306 See TRAC at 4.

307 See Continental at 23-24.

308 See Discovery at 26-27.

309 See Liberty Media at 50; Times Mirror Reply at 5.

310 TCI at 28.

that a grant of exclusivity in exchange for favorable channel position might be permissible if it were for a limited duration.[311] Liberty Media suggests that exclusivity be permitted for vendors providing local programming.[312] Some commenters suggest that exclusivity should be permitted to meet a competitor's offer of exclusivity to another distributor in the same geographical area.[313]

89. In addition, numerous commenters argue that exclusivity should be permitted to develop and launch new programming services.[314] Indeed, several argue that not allowing such exclusivity will decrease diversity by eliminating a necessary incentive to invest in new programming.[315] NSPN responds that the argument that exclusivity is necessary to launch a new service is "total nonsense," and that the only rationale for exclusivity is to "protect a franchised cable company from competition."[316] CableAmerica agrees that exclusivity is not necessary for new services, because a new service needs to build an audience and should be distributed as widely as possible.[317] WCA states that the argument that exclusivity is mandatory for new services has "never been substantiated," and the burden should be on the proponent of exclusivity to show that it will increase revenues for the new service.[318] Turner responds that commenters doubting that exclusivity is essential to launch a new service should have provided specific evidence or arguments to the contrary. Turner submits that no such showing was made, and that the Commission "may safely assume that exclusive contracts are essential to launch new services."[319]

90. WCA contends that Section 628(c)(2)(D) requires a case-by-case public interest analysis for all permissible exclusive contracts, and that the Commission does not have the authority to issue a blanket presumption for new services. Even if it the Commission had the authority to determine that a class of contracts could be presumed to be in the public interest, WCA argues, the record does not support such a presumption for new services.[320] Other

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311 See CableAmerica at 38.

312 See Liberty Media at 50.

313 See ARC at 16; Liberty Media at 50.

314 See Liberty Media at 50; Time Warner at 44; Continental at 21; Turner at 5-6; ARC at 16; Viacom at 36; US West at 8-9; TCI at 28; SBCA Reply at 14, NCTA Reply at 4.

315 See Liberty Media at 49-50; Turner at 7; ARC at 17.

316 NSPN at 12.

317 See CableAmerica at 38.

318 See WCA at 41.

319 Turner Reply at 4.

commenters agree that a blanket presumption or exemption for new services should not be permitted.[321] NYNEX states that if the Commission does establish such an exemption or presumption, it should carefully define what qualifies as a "new programming service," and any such presumption should not permit exclusivity for more than one year.[322]

91. US West states that exclusivity for new services should be permitted, but should be limited to two years.[323] APPA agrees that if a new service is going to succeed, "this should occur well within two years" and exclusivity should not be permitted beyond that.[324] Continental responds that two years for a new service is not nearly long enough, and that at least a seven year startup period is necessary to give the service time to take root and give the distributor the necessary incentive to market the service.[325] Turner agrees that two years is insufficient, and compares this proposal to limiting patent protection to two years.[326] Viacom suggests that a reasonable duration for exclusive contracts for new services is ten years.[327] Time Warner agrees that a promise of exclusivity for any period less than ten years may not be sufficiently valuable to distributors to persuade them to carry a new service.[328] NCTA states that the Commission should rule that exclusive contracts of any duration entered into during the first two years of the programmer's existence are presumptively in the public interest.[329] SBCA urges the Commission to adopt a "liberal" period of exclusivity, arguing that it is not possible to determine at this time the exact period of time needed or the degree of flexibility.[330] In addition, some commenters argue that exclusivity should be permitted to introduce existing services to new markets.[331]

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320 See WCA Reply at 16-17.

321 See DirecTV at 28; TRAC at 4; Consumer Satellite Systems Reply at 7.

322 See NYNEX at 13-14.

323 See U.S. West at 9.

324 See APPA at 21.

325 See Continental at 21-22.

326 See Turner at 7.

327 See Viacom at 37.

328 See Time Warner at 45.

329 See NCTA Reply at 44.

330 See SBCA Reply at 14.

331 See Liberty Media at 50; ARC at 17; Cablevision Reply at 5.

IV. Enforcement

A. Process

92. Several commenters support the use of the Section 208 (formal common carrier) complaint process.[332] Others encourage alternative dispute resolution (ADR) as a means of resolving disputes.[333] They argue that ADR is strictly voluntary and note that the parties can agree on any process that will assist in resolution of the dispute, including discovery.[334] Discovery suggests that ADR should be voluntary because in some cases, settlement is not realistic.[335] SBCA submits that if both parties do not agree to ADR, the FCC could make a determination through the use of ALJs or through the use of a set group of designated FCC staff members.[336] Landmark does not support the use of ADR as a means to resolve Section 628 complaints because it may have the potential of encouraging frivolous claims which can result in significant costs and be particularly harmful for new services.[337]

93. With respect to timing, ACC advocates that disputes should be resolved within 60 days of the filing of a complaint.[338] Several commenters assert that the proposed 20 day period for an answer is inadequate for a defendant.[339] TCI contends that it is unrealistic and unfair to suppose that the defendant could marshall and present not only a denial but affidavits and evidence as to all material allegations of the complaint without discovery and in only twenty days.[340] Time Warner suggests the Commission should allow at least 30 days to file an answer.[341]

94. In addition, EMI suggests that grievance procedures be limited to expedited "paper hearings" with limited pleadings and discovery and should only be permitted after a status conference has been conducted to determine if sufficient facts have been alleged to allow the complaint to go forward.[342]

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332 See, e.g., Superstar at 65; TCI at 37.

333 See, e.g., Attorneys General at 14; APPA at 26.

334 See Attorneys General at 15.

335 See Discovery at 31.

336 See SBCA Reply at 13.

337 See Landmark Reply at 16.

338 See ACC at 12.

339 See, e.g., Liberty Media at 59-60; Time Warner at 45; TCI at 41.

340 See TCI at 41.

341 See Time Warner at 45.

CCWCO and CableAmerica believe that once the complaint is reviewed to determine if a prima facie case has been established, a status conference should be held to determine if the parties can resolve the matter privately.[343] CableAmerica proposes that the status conference must be held within 45 days after a complaint is filed.[344]

95. Several commenters complain that the process should not be as complicated as proposed by the Commission.[345] Bell Atlantic complains that cable companies seek to thwart Congressional objectives by placing insurmountable procedural barriers in the path of challenges to unfair practices.[346] Liberty Cable states that non-cable MVPDs do not have the time and resources to engage in protracted litigation before the Commission during which they have to present detailed evidence.[347] USTA states that the FCC should not cast an effective veto over the program access provisions by adopting rules that gut the law.[348] APPA alleges that commenters who suggest that the FCC's proposals are inadequate and that recommend procedures which would liken complaint proceedings to full-blown civil trials should be viewed with great skepticism, noting that they appear to be motivated by a desire to make the complaint process as time-consuming, expensive and unattractive as possible for complainants.[349] TCI advocates a complex process, arguing that conventional pleading practices and trial type hearings before an ALJ will be required in most program access disputes. TCI believes that the existence or nonexistence of a challenged act or practice is only the tip of the iceberg; the real issue is likely not to be whether something happened but what difference it makes to actual and potential competition in a properly defined market.[350]

96. With respect to pleadings, APPA states that limiting pleadings to a single complaint and a single response is feasible, so long as these documents are understood to be vehicles to define and narrow issues and not necessarily to resolve them where discovery, a hearing, a right to confront and cross-examine witnesses, and findings of fact and conclusions of law may be

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342 See EMI at 13.

343 See CCWCO at 4; CableAmerica at 40.

344 See CableAmerica at 40.

345 See, e.g., Bell Atlantic Reply at 20; USTA at 7; Liberty Cable at 20.

346 See Bell Atlantic Reply at 20.

347 See Liberty Cable at 20.

348 See USTA Reply at 7.

349 See APPA at 13.

350 See TCI at 39.

necessary.[351] ACC states that only limited discovery and no dispositive motions should be allowed.[352] However, Liberty Media states that the FCC should permit the filing of pre-answer motions for a more definite statement and strongly recommends that the Commission permit motions for summary judgment at any time.[353] Time Warner argues that not permitting the filing of separate motions to dismiss or for summary judgment would not yield much expedition. APPA suggests that a written reply would enhance rather than inhibit the FCC's ability to frame the issues.[354] Liberty Media and CCWCO support the Commission's proposal to eliminate replies to answers.[355]

97. With respect to standing, Landmark believes that only MVPDs can bring Section 628 complaints and that the Commission should not permit subscribers to file complaints because subscribers do not have standing. It contends that subscriber standing has the potential to overwhelm the Commission's resources.[356] Conversely, NYNEX believes that the FCC's rules should clarify that complaints may be brought by any person aggrieved by conduct violating these sections of the Act and the right to bring a complaint must not be limited to MVPDs or video programming vendors.[357]

B. Burden of Proof

98. Commenters disagree on how much information should be submitted to the Commission and who should file that information. Bell Atlantic advocates requiring distributors to publicly disclose, through informational filings with the FCC, the rates, terms and conditions under which they obtain programming.[358] CCWCO advocates requiring vendors to file such data with the Commission.[359] DirecTv would exclude excessive public disclosure of confidential business information, and states that most of the relevant factual information is in the possession of the distributor or vendor rather than the aggrieved MVPD.[360] CATA and WJB similarly argue that the information lies with the vendor, and that the burden of producing evidence showing the

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351 See APPA at 26.

352 See ACC at 12.

353 See Liberty Media at 61-62.

354 See APPA at 27.

355 See Liberty Media at 61; CCWCO at 4.

356 See Landmark at 17.

357 See NYNEX at 15-16.

358 See Bell Atlantic at 10.

359 See CCWCO at 5.

360 See DirecTv Reply at 11.

reasonableness of various prices, terms and conditions should be on the party in possession of relevant facts.[361]

99. Liberty Media advocates that each factual allegation in a complaint be supported by affidavits or relevant documents.[362] APPA believes that requiring a complainant to support its allegations with detailed evidence is feasible only if the FCC establishes an effective mechanism outside the complaint process through which purchasers can gather relevant information about their vendors' practices. If no such mechanism exists, APPA argues, complainants should be afforded an opportunity to engage in discovery before the FCC.[363] The Attorneys General assert that the complainant should have the benefit of discovery before he is required to establish a prima facie case.[364] USTA adds that specific allegations of misconduct and detailed explanations of a violation tend to be well concealed and may not come to light absent opportunities for disclosure and discovery.[365] WCA states that an aggrieved wireless cable operator will have little information available to it prior to the initiation of discovery. Thus, WCA argues that the threshold for a prima facie case must be established at a relatively low level.[366] WJB states that a complainant should only be required to establish a reasonable basis for believing that discrimination has occurred; by necessity, the burden of disproving discrimination should rest with the vendor, the only party privy to the relevant information.[367]

100. Various commenters offer specific proposals with respect to the appropriate allocation of the burden of proof in the Section 628 complaint process.[368] DirecTv proposes a specific model for handling complaints and suggests a two-step pleading cycle with expedited discovery of contracts and other relevant information in the possession of the vertically integrated programmers and cable operators. It submits that a complaint under any provision of Section 628 should be sufficient if made on an affidavit by an officer of the MVPD and that a complaint adequately establishes a prima facie case under Section 628(c)(2)(B) if it alleges: (a) that a programming vendor offers a particular programming service for sale to other MVPDs; (b) that the

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361 See CATA at 8; WJB at 17; WJB Reply at 13.

362 See Liberty Media at 59.

363 See APPA at 27.

364 See Attorneys General at 13.

365 See USTA at 14.

366 See WCA at 44.

367 See WJB Reply at 13.

368 See, e.g., Attorneys General at 14; CableAmerica at 41; DirecTv Reply at 12; SBCA Reply at 12.

complainant is a MVPD that is technically and financially capable of delivering the programming to subscribers; (c) that the complainant has made a bona fide attempt to negotiate with the programmer; (d) that the programming vendor has discriminated in the prices, terms or conditions of sale or delivery of its programming among or between the complainant and one or more cable operators or other MVPDs; (e) that the programming vendor is either a "satellite cable programming vendor in which a cable operator has an attributable interest" or a "satellite broadcast programming vendor," as defined in the Act and the Commission's rules; and (f) that the programming in question is either "satellite cable programming" or "satellite broadcast programming" as defined in the Act.[369] DirecTv advocates that upon filing a complaint, the burden should shift immediately to the vendor or distributor that is the subject of the complaint to show that the allegations contained in the complaint are untrue.[370]

101. CableAmerica suggests that a Section 628(c) complainant may still be required to make out a prima facie case that a vertically integrated satellite cable programming vendor has entered into a programming contract that discriminates against the complainant operator in price, terms, or conditions of sale or delivery (Section 628(c)(2)(B)), or affords a competing programming distributor exclusive rights to a programming service (Section 628(c)(2)(D)). In a Section 628(b) proceeding, CableAmerica submits, the operator would have to make out a prima facie case that such a vendor was engaging in unfair competition or unfair or deceptive acts or practices and, unless the complainant alleged an anticompetitive purpose, the complainant would also have to establish a prima facie case that the practice prevented or significantly hindered the operator in providing programming to its customers. CableAmerica advocates that the burden of proof should be placed on the respondent, the party that entered into the discriminatory or exclusive contract, and which is therefore in a better position to present any justifications for its conduct.[371]

102. SBCA submits that the complainant first has to establish that it has standing, that there is evidence of a differential in price, terms or conditions, and that all other requirements of the Act and the FCC's rules are met. The defendant then has the opportunity to refute any or all of this evidence. In the second phase, SBCA would have the Commission instruct the parties to attempt to negotiate a settlement within 20 days. If the first two phases do not work, the complaint would proceed to adjudication and the burden would then shift to the defendant programmer to justify a legitimate basis for the differential shown. If the programmer offers a legitimate justification, the burden shifts back to the complainant to show that the proffered justification is either a pretext or is inadequate to justify the differential treatment.[372]

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369 See DirecTv Reply at 12.

370 Id. at 13.

371 See CableAmerica at 40-41.

103. Attorneys General support the Commission's model in the Notice and state that a complainant must provide substantial evidence that (1) the competitor has been denied programming; (2) the competitor has complied with or offered to comply with reasonable requests from the programmer; (3) the price or other terms of the programming available to the competitor are different from those offered to the cable operator; and (4) the programming contract contains anticompetitive terms which have the "effect" of significantly hindering or preventing programming availability. The burden of producing legitimate business reasons for denying access to the desired programming would then shift to the programmer.[373]

104. United Video strongly supports the burden of proof remaining on the complainant. It also argues that the effect of a satellite broadcast program vendor's pricing must be examined from the perspective of an adverse effect on consumers before any case can be made for discrimination. United Video supports the Commission's decision to require the complainant to initially establish a prima facie case before any complaint proceeding is initiated and argues that the complaint should give specific evidence demonstrating that the effect of the program vendor's actions is to significantly hinder program distribution in the marketplace, including (1) a description of the geographical boundaries in which the discrimination occurred; (2) a list of all television services available in any part of the geographical boundary; (3) current prices and penetration figures; and (4) proof that the complainant has actively marketed services within the area. It asserts that the Commission will be flooded with complaints unless the complainant is required to establish a prima facie case demonstrating harm and accompanied by sufficient factual substantiation which addresses all of the provisions of Section 628.[374]

105. CCWCO state that the complaint should be required to include specific factual evidence supported by affidavits from knowledgeable persons.[375] Time Warner agrees that any complaint should be verified and accompanied by affidavit or documentary evidence.[376] NYNEX urges a minimal burden on complainants which would not require complainants to establish a prima facie case.[377] CCWCO submits that the FCC should establish a presumption of discrimination where programming has been denied outright to a wireless cable operator or where the wireless cable operator is paying a higher fee for

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372 See SBCA at 8-12.

373 See Attorneys General at 14.

374 See UVI at 36-39; UVI Reply at 4-6.

375 See CCWCO at 4.

376 Time Warner at 46-47.

377 See NYNEX at 14.

the programming than other similar-sized operators.[378] Bell Atlantic suggests when a complainant makes a prima facie showing of disparate treatment, the burden should rest with the cable operator to prove a legitimate reason for the disparate treatment. It should be enough for a MVPD to show, for example, that it has had difficulty obtaining programming acquired by another MVPD or that the rates or terms that a programmer has offered appear to be less favorable than those extended to competitors.[379] NRTC, WCA and ACC believe the FCC has suggested unrealistic burdens for distributors filing discrimination complaints.[380]

106. Rainbow suggests that a complainant should be required to establish both prongs of the statutory test, and a programmer should be able to rebut a prima facie case based on documentary evidence alone.[381] APPA, however, argues that a complainant should not be required to prove harm once he has established that the respondent has engaged in prohibited conduct.[382] ACC, CATA and NRTC state that once a verified discrimination complaint is filed and the distributor has established the existence of discriminatory prices, terms or conditions, then the burden of proof shifts to the vendor to justify, by clear and convincing evidence, that any discriminatory conduct or terms are justified since vendors will possess any relevant documents.[383]

107. None of the commenters supported the use of benchmarks or presumptions based on penetration levels. WJB states that establishing a presumption based on penetration levels may be unwise.[384] CableAmerica maintains that considerations such as whether other cable operators are offering the subject programming, or what the penetration level is for that programming are inappropriate because they would justify a vendor in discriminating against one programming distributor so long as it did not discriminate against all, or denying programming to some customers as long as it did not deny it to all.[385] Superstar and UV believe that it is impossible to set effective benchmarks accurately reflecting the vast differences in business operations of the various programming vendors and the very different markets they serve.[386] Superstar further believes that many technical factors

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378 See CCWCO at 4.

379 See Bell Atlantic at 9; Bell Atlantic Reply at 19.

380 See NRTC at 30; WCA at 44; ACC at 9.

381 See Rainbow at 18.

382 See APPA at 27.

383 See ACC at 12; CATA at 7; NRTC at 30.

384 See WJB at 18.

385 See CableAmerica at 41.

386 See Superstar at 66; UVI at 39.

impact penetration levels and it would not be fair or wise to establish an absolute rule concerning penetration.[387] Liberty Media states that the creation of a presumption that the complainant has stated a prima facie case under Section 628, based on penetration rights or sales volumes ratios is arbitrary and unreasonable.[388]

C. Discovery

108. CableAmerica urges the Commission to expedite the discovery process and be guided by the recent amendments to the Federal Rules of Civil Procedure (FRCP).[389] Liberty Media suggests that the number and scope of discovery disputes could be substantially reduced through the adoption of regulations similar to FRCP Rule 37(a)(4). Under that rule, the party or attorney whose conduct necessitated the filing of a motion to compel pays the reasonable expenses and attorneys fees of the prevailing party unless the court finds that the losing party's position was substantially justified.[390] U.S. West suggests that the FCC should allow pre-complaint discovery similar to that allowed under FRCP Rule 27(a). This would allow parties alleging misconduct to determine whether there is any basis for a complaint in those cases where video programming is provided under unique contracts rather than standard pricing matrices.[391]

109. Rainbow states that absent extraordinary circumstances, a complainant should not be able to engage in discovery to establish its prima facie case. Instead, discovery should be limited to evidence necessary to meet the complainant's burden of persuasion and evidence to rebut the complainant's prima facie case. Rainbow asserts that the complainant should be obligated to demonstrate the need for evidence claimed by a vendor to be confidential or proprietary.[392] Time Warner thinks discovery should not be permitted as a right, but that the Commission should instead require a complainant to show a particular need for discovery.[393] Liberty Media believes that the Commission should set appropriate limits on discovery and limit initial discovery to a specified number of interrogatories.[394]

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387 See Superstar at 67.

388 See Liberty Media at 56.

389 See CableAmerica at 42.

390 See Liberty Media at 63.

391 See U.S. West at 16.

392 See Rainbow at 19.

393 See Time Warner at 47.

394 See Liberty Media at 63.

110. TCI believes that the defendant is unlikely to be able to respond to allegations about the effects of its acts or practices without full inquiry into effects of those practices on the complainant. It argues that discovery is necessary to address the issue of marketplace effect. TCI submits that the Commission should require that the taking of any discovery by any party in a program access proceeding is explicitly conditioned upon that party's submitting in advance to the jurisdiction of the FCC and the U.S. District Court for the District of Columbia for the enforcement (by injunction and monetary sanction) of any protective order entered by the FCC in the proceeding.[395] CableAmerica agrees with the FCC's proposal regarding the issuance of protective orders and argues that the Commission should provide for appeals challenging redactions on information not relevant to a complaint to the ALJ and/or the Commission on an case-by-case basis.[396] DirecTv proposes that discovery be in the form of a questionnaire that the defendant must complete and submit to the FCC and the complainant. This questionnaire would act as a standardized form of written interrogatories for all complaints under Section 628 and would evoke the information necessary for resolution of the dispute from the defendant programmer or cable operator, who has the information.[397]

D. Remedies

111. Liberty Media states that any remedial action which mandates the sale of specific programming to a specific distributor and establishes the prices, terms and conditions of that sale, is particularly suspect under the Constitution and is contrary to the Commission's prior recommendations to Congress.[398] Rainbow advocates that absent evidence of bad faith or a history of violations of the Act, the FCC should ordinarily remand the matter to the parties for renegotiation rather than expend the significant administrative resources that would be necessary for the agency to establish new terms.[399]

112. Superstar and UVI agree that Section 628(e)(1) is sufficient and there is no need for an award of damages; if damages are awarded, they should be only for profits lost to the "favored" distributor.[400] TCI and Time Warner also oppose imposing fines for Section 628 violations unless the conduct complained of is willful and repeated.[401] DirecTv agrees that while the imposition of forfeitures should be an option for egregious violations, the

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395 See TCI at 42-43.

396 See CableAmerica at 42.

397 See DirecTv at 14.

398 See Liberty Media at 56.

399 See Rainbow at 19.

400 See Superstar at 67; UVI at 40.

401 See TCI at 43; Time Warner at 43.

ultimate remedy will always be to ensure that the programming is available to MVPDs on non-discriminatory terms. DirecTv concludes that the most common remedy will be for the FCC to order a programmer to provide programming to the complainant on the same terms and conditions as other MVPDs enjoy.[402] ACC suggests the assessment of treble damages against those found to have engaged in discriminatory or anticompetitive conduct by unlawfully restricting access to programming.[403] CableAmerica suggests that four remedies in addition to those in the Notice would be appropriate: (1) orders to void unjustified exclusive contracts; (2) civil penalties; (3) money damages, where unfair, deceptive, or discriminatory acts or practices, or exclusive contracts, have injured a complainant; and (4) attorneys fees and costs.[404]

E. Frivolous Complaints

113. Commenting programmers agree that it is important to provide penalties against parties filing frivolous complaints.[405] The consensus among programming vendors is that FRCP Rule 11 provides an appropriate model for assessing such sanctions; Rule 11 states that all allegations must be well grounded in fact and the complaining party must have a reasonable basis for making the statements. They argue that sanctions against a frivolous complainant should include attorney's fees and costs to respondent, as well as fines imposed by the Commission to account for the resources expended on administering the process. They also contend that a minimum forfeiture should be set sufficiently high to discourage frivolous complaints.[406]

114. Conversely, several parties, including NRTC and DirecTv, believe that the Commission should tread lightly so as not to deter legitimate complaints. These parties assert that a complaint based on an actual difference in price, terms, or conditions is by definition not frivolous.[407] DirecTv suggests the Commission rely on its existing abuse of process rules to deal with "frivolous" complaints.[408] In reply, United Video recommends that complaints which contain only general and unsupported allegations should be dismissed.[409]

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402 See DirecTv at 31.

403 See ACC at 11.

404 See CableAmerica at 42-43.

405 See E! at 11; Liberty Media at 65; Superstar at 67; UVI at 41.

406 See, e.g., EMI at 13.

407 See NRTC at 31-32; DirecTv at 31-32.

408 See DirecTv Reply at 16.

409 See UVI Reply at 5.

V. Application of Anti-Discrimination Provisions to Existing Contracts

115. Most commenters opposing application of the regulations developed under Section 628 to existing contracts relied upon Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988), arguing that such application would have an impermissible "retroactive" effect.[410] In Bowen, the Supreme Court held that agencies may not apply federal legislation retroactively unless Congressional intent to do so is clear: "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." Id. Therefore, according to commenters such as Landmark, the Commission cannot apply the provisions of Section 628 retroactively because we "note[d] that the statute is silent concerning enforcement of anti-discrimination rules with respect to existing contracts."[411] Others argue that there is nothing in the legislative history to indicate that Congress intended the Commission to abrogate existing program distribution agreements or to adopt retroactive regulations.[412]

116. A number of programmers comment that, even if the Commission concludes that it has authority to adopt regulations that would affect existing contracts, such action would be unwise.[413] Liberty Media stresses that virtually every programmer has asserted that they have entered into costly programming contracts based on the revenues they expect to receive from existing affiliation agreements, and that forced premature renegotiation of affiliation agreements may preclude programmers from honoring their commitments to program suppliers.[414] Viacom states that "[a] high degree of certainty is

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410 See Landmark at 10-11; Rainbow at 17-18; Superstar at 62-64; TCI at 16-18; TWE at 33-34; UVI at 32-34; Viacom at 29-30; Landmark Reply at 8 n.15; Liberty Media Reply at 33; TBS Reply at 3; TCI Reply at 12-13 & nn. 19-20; Time Warner Reply at 15. Some commenters cited other cases in support of the argument that congressional intent is the arbiter for retroactive application of statutes. See, e.g., Superstar at 62-64; TCI at 16-18; UVI at 32-34 (citing Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 836-37 (1990)), Superstar at 62-64; TCI at 16-18 (citing Wagner Seed Co., Inc. v. Bush, 946 F.2d 918, 924 (D.C. Cir. 1991)).

411 See Landmark at 10-11 (quoting Notice, 8 FCC Rcd. at 201).

412 See TCI at 16-18; Time Warner at 32-34; UVI at 35; Viacom at 29-30; Time Warner Reply at 15.

413 Additionally, the programmers also contend that if the Commission determines that it has the authority to apply Section 628 to existing contracts, the language in Sections 628(b) and 628(c)(2)(B) address discrimination in contracting, not in the performance of pre-existing contracts, thus placing distributors who contracted before the effective date of the rules outside the scope of section 628. See Time Warner at 33-34; Liberty Media Reply at 33; Time Warner Reply at 16.

414 See Liberty Media Reply at 33-34; see also Viacom at 31; IFE at 11; E!

needed during the remaining terms of existing affiliation agreements ... to attract capital or to justify a large expense in the acquisition of programming and the development of a program service ..."[415] In addition, commenters contend that the existing contracts were the result of extensive negotiations and that reconstruction of the bargaining history and marketplace conditions present at the time they were negotiated would be a difficult if not impossible task.[416] For example, IFE argues that prices and related terms in many of its contracts were negotiated quid pro quo for various other contractual provisions, and that the Commission cannot simply reform price provisions without changing or subjecting to renegotiation or litigation many of the other provisions.[417] Some commenters further contend that the direct and indirect costs of requiring the simultaneous renegotiation of all pre-existing programming contracts would be potentially enormous and ultimately would lead to higher prices for consumers.[418]

117. These commenters also contend that a complainant should not be allowed to use a contract entered into before the Act or the effective date of the rules as a basis for determining whether a contract entered into after the Act violates Section 628.[419] Alternatively, several commenters submit that only contracts contemporaneously entered should be used for comparison.[420] Meanwhile, Viacom submits that the point of comparison for determining whether new contract rates offered to the complainant are reasonable should be the then effective rate paid by a competing competitor vertically integrated with the program service, even if that rate is the result of an agreement executed prior to the effective date of the rules.[421] Time Warner expresses concern that commenters proposing the use of pre-existing contracts as a baseline comparison for later contracts will create an impossible situation for programmers in that distributors that "got a bad deal" would be able to get out of their agreements to get the same rate as distributors that "got a good deal."[422] Commenters

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at 10; Time Warner at 32.

415 Viacom at 31; see also NCTA at 34 n.59.

416 See ARC at 17-18; IFE at 11; TBS at 2-3; Liberty Media Reply at 34; TBS Reply at 2; Time Warner Reply at 16 n.9.

417 IFE at 4-5.

418 See, e.g., TBS at 4; Landmark Reply at 7; Liberty Media Reply at 34; NCTA Reply at 33; TCI Reply at 13-14; Time Warner Reply at 16 n.9.

419 See Landmark at 11; Rainbow at 17-18; Time Warner at 34; Viacom at 34-35; TBS Reply at 2.

420 See Landmark at 13; Time Warner Reply at 16.

421 See Viacom at 34-35.

422 See Time Warner Reply at 17.

opposing retroactive application also suggest a number of timetables by which the new rules should become effective.[423]

118. In contrast, commenters in favor of application of the anti-discrimination provisions to existing contracts distinguish Bowen and argue that Congress was not silent on this issue. NRTC asserts that the cases on so-called "retroactivity" involved different types of obligations than are present here.[424] Similarly, US West claims that "[u]nlike Bowen the issue at hand does not deal with the 'recoupment' of previously paid sums but only deals with prospective events."[425] Moreover, to further diminish its impact, NRTC contends that there is a line of decisions under Bradley that conflict with Bowen.[426]

119. In any event, NRTC states that in Kaiser, the Supreme Court commented that "[w]e need not in this case, however, reconcile the two lines of precedent represented by Bradley and Georgetown [Bowen], because under either view, where the congressional intent is clear, it governs."[427] NRTC argues there is no evidence of congressional intent not to apply Section 628 to existing contracts; in fact, the language of Section 628 requires immediate effect -- otherwise "the specific grandfathering under Section 628(h) would have been moot and superfluous."[428] APPA argues that commenters' reliance on

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423 See, e.g., Group W Satellite at 9 (three years after the effective date of the rules); Time Warner at 34 n.27 (five years); UVI at 36 (six months from the date of any non-appealable order concerning the constitutionality of Section 628 or the propriety of the Commission's regulations); Viacom at 29-30 (establish no date).

424 NRTC Reply at 20. NRTC cites Bowen (Secretary of Health and Human Services attempted to recoup money from Medicare service providers); Bradley v. School Board of Richmond, 416 U.S. 696 (1974) (effect of Education Amendments Act of 1972 on awarding of attorneys fees in desegregation cases); Kaiser (effect of amendment of postjudgment interest statute on verdict that was still on appeal).

425 See US West Reply at 5 n.10. Similarly, NRTC asserts that the statute does not comport with the traditional definition of a retroactive statute, which "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to obligations or considerations already past." Nield v. District of Columbia, 110 F.2d 246, 254 (D.C. Cir. 1940) (quoting Society for Propagation of the Gospel v. Wheeler, Fed. Cas. No. 13156, 2 Gall. 105, 139 (C.C.D.N.H. 1814)).

426 See NRTC at 23 n.19. In this regard, we note that TCI acknowledges that the Supreme Court has not reconciled the holding in Bowen with other decisions that permit retroactive application of statutes. See TCI at 16-18 (citing Kaiser, 494 U.S. at 837; Bradley).

427 NRTC at 23-24 (quoting Kaiser, 110 S. Ct. at 1577).

Bowen is misplaced because Congress made it clear that Section 628 applied to existing contracts with the limited exception set forth in Section 628(h)(1).[429] Moreover, APPA argues, in Section 628(h)(2), Congress withdrew even that exemption for contracts existing on June 1, 1990 that are renewed or extended after the date of enactment of 1992 Cable Act.[430] In sum, the commenters urging application of program access provisions to existing contracts argue that Congress's failure to exempt contracts other than the narrowly tailored exemption in Section 628(h) for exclusive contracts mandates the conclusion that Congress intended to include all other contracts within coverage of the Act.[431]

120. In addition, GTE contends that the Commission's tentative decision not to apply the anti-discrimination requirements to existing contracts "may not achieve the results Congress envisioned from the requirements of Section 628 in a timely fashion given the long term nature of many programming agreements."[432] A number of commenters agree, several citing Time Warner's discussion of its HBO affiliation agreements. Time Warner reported that some of the agreements run for as little as 3 years, while the average term is 5, and there are some that are of 10 years' duration. Time Warner also states that a third of all present subscribers to the HBO service are through affiliation agreements that run until 1998 or longer.[433] US West responds that "[i]f HBO contracts are any indication of the length and scope of other video programming contracts, Commission adoption of a rule grandfathering existing contracts would preclude competition in many parts of the multichannel video programming market."[434] CSS argues that multichannel video program

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428 NRTC Reply at 21.

429 In Section 628(h)(1), Congress expressly exempted from the scope of Section 628 exclusive distribution contracts in areas served by cable that were entered into before June 1, 1990.

430 See APPA Reply at 9-10.

431 See APPA at 10; WCA at 29; CableAmerica at 36; NRTC at 32; NYNEX at 12 n.30; USTA at 5-6; WCA at 29; Bell Atlantic Reply at 18 n.41; CSS Reply at 7; Cross Country Reply at 9-10; GTE Reply at 7; NRTC Reply at 18 & n.17. However, commenters opposing "retroactive" application assert that the grandfathering provision in Section 628(h) falls short of authorization to apply the anti-discrimination provisions retroactively (see Superstar at 64; TCI at 18; UVI at 34), and that where Congress wanted to abrogate existing contracts, it did so explicitly, citing Section 628(h)(2) (see Turner Reply at 3). Liberty Media and Time Warner contend that interpreting congressional silence as granting retroactive rulemaking authority to the Commission is counter to Bowen. See Liberty Media Reply at 33; Time Warner Reply at 15.

432 GTE Reply at 6.

433 See Time Warner at 31-32.

distributors that currently are operating under discriminatory rates will be at a disadvantage if they have to wait for those contracts to expire before they can achieve parity with competitive distributors.[435]

121. Commenters propose a variety of methods for bringing existing contracts into compliance with the program access provisions. A number of commenters urge that the statutory provisions should become effective immediately.[436] APPA suggests a reasonable grace period of two years, and further suggests that the Commission entertain programmers' claims of hardship on a case-by-case basis to avoid the marketplace chaos they claim will be inevitable.[437] Under DirecTv's complaint-based analysis, when a multichannel video program distributor that is not a party to a contract files a complaint alleging discrimination as compared to a party to such preexisting contract, the preexisting contract would not have to be altered as long as the same terms/conditions were made available to the complainant.[438] WCA contends that a wireless cable operator should be able to use a pre-existing contract with a cable operator to compare whether a future contract offered the wireless operator is discriminatory, and that the programmer should be required to justify a price differential.[439]

VI. Other Issues

A. Data Collection

122. Commenting programmers share the concern that distributors will be tempted to use the complaint process to acquire proprietary information that will result in a business advantage.[440] They submit that price is but one

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[434] US West Reply at 5 n.11. See also Liberty Cable Reply at 4; GTE Reply at 7 (noting that the prohibition on cable exclusivity sunsets after ten years absent FCC rulemaking justifying continuation); NRTC at 23 n.18 (arguing that Congress did not assign the program access rulemaking a 180-day trigger date only to have the regulations lie dormant for 3-5 years or longer).

[435] See CSS Comments at 7. CSS asserts that "[n]ew [multichannel video program distributors] will be able to enter the market, assert rights to nondiscriminatory rates under Section 628, and be placed in a position of significant competitive advantage. Similarly, cable affiliated home satellite dish packagers may be able to demand and receive rate adjustments, while independent packagers such as NPS are powerless to do otherwise." Id.

[436] See NRTC at 32; WCA at 29-30 (would allow programmers a reasonable opportunity of 90 days after publication of the rules in the Federal Register to bring their existing agreements into compliance).

[437] See APPA Reply at 10.

[438] See DirecTv at 26 n.32; see also GTE Reply at 7.

[439] See WCA at 29 n.61.

element in the negotiating process. The programmers argue that public disclosure of terms and conditions would lessen competition because programmers would know the details of each other's key competitive tools. Thus, the programmers ask for the inclusion of appropriate safeguards for proprietary information, including (1) strict limits on distribution and disclosure of the information produced in discovery; (2) permission to redact unrelated information; and (3) in camera inspection by Commission of proprietary information. Viacom suggests that the complainant's burden of proof should be one which can be met using information already in the public domain.[441] All commenters agree that the standard protective order is an advisable instrument to which all proprietary data should be subject. Proponents of liberal discovery, NRTC and NYNEX, point out that the "best evidence" is in the hands of the programmers, and is rarely available for view by the distributors.[442] Thus, in the interest of equity, they argue, the Commission should make proprietary information available to potential complainants.

B. Annual Report

123. With respect to information to be provided for the Commission's annual report to Congress, Viacom argues that any sharing of sensitive competitive information would hurt competition and contradict fundamental antitrust principles. It contends that since the exchange of price information tends toward price uniformity, prices would likely be stabilized and other competitively important terms and conditions would quickly be neutralized to the detriment of distributors and, in turn, consumers.[443] On the other hand, NRTC suggests that the Commission require programmers to file annual "General Rate Structures" that include (1) the average monthly cable subscription rate; (2) the 20 highest and 20 lowest individual subscription rates; (3) a listing of volume discounts; and (4) a description of all specific adjustments to rates.[444]

C. Geographic Areas

124. Group W and Time Warner agree with the Commission's interpretation that Section 628 does not require a national or regional distributor to make programming available outside of its geographic area of license.[445] Any complaints, they argue, should be limited to within the distributor's area of

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[440] See E! at 12; Group W at 11; Superstar at 69; UVI at 41; Viacom at 23-24.

[441] See Viacom at 23-24.

[442] See NRTC Reply at 32; NYNEX at 16.

[443] See Viacom Reply at 18-19.

[444] See NRTC Reply at 33-34.

[445] See Group W at 10; Time Warner at 48.

license. Time Warner believes that the geographic limitations exemption refers to programming vendors, not to distributors. Time Warner also submits that the practice of "blacking out" events in certain areas does not violate Section 628.[446] Other commenters are critical of the Commission's interpretation.[447] These parties argue that it is difficult to envision how the Commission can carry out its directive to extend programming if the applicability of Section 628 is limited to the geographic area of license. They contend that there is extensive evidence demonstrating the incentives for a programmer to act in an anti-competitive manner both within and beyond its geographic area of license.

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446 See Time Warner at 48.

447 See CSS Reply at 6; NRTC at 14 n.6.

APPENDIX D: Final Regulatory Flexibility Analysis

Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

I. Need and purpose of this action:

This action is taken to implement Section 19 of the Cable Television Consumer Protection and Competition Act of 1992.

II. Summary of the issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis:

There were no comments submitted in response to the Initial Regulatory Flexibility Analysis.

III. Significant alternatives considered:

We have analyzed the comments submitted in light of our statutory directives and have formulated regulations which, to the extent possible, minimize the regulatory burden placed on entities covered by the program access provisions of the Cable Act. Different entities will be affected in different ways. Some programming vendors may be forced to alter their pricing policies or their contracting policies while other MVPDs, who are more likely to be small entities, may receive benefits in increased access to or lower prices for satellite cable or satellite broadcast programming.

IV. Federal Rules which overlap, duplicate or conflict with these rules.

Sherman Act, Clayton Act and Robinson-Patman Act.

V. Paperwork Reduction Act Statement

The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose new and modified information collection requirements on the public. Implementation of any new or modified requirements will be subject to approval by the Office of Management and Budget as prescribed by the Act.

APPENDIX E

Part 76 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 76 — CABLE TELEVISION SERVICE

1. The authority citation for Part 76 is revised to read as follows:

Authority: 47 U.S.C. 152, 153, 154, 301, 303, 307, 308, 309, 532, 533, 535, 542, 543, 548, 552.

2. The heading in Subpart O is revised to read as follows:

Subpart O — Competitive Access to Cable Programming

3. Section 76.1000 is added to Subpart O to read as follows:

§76.1000 Definitions

As used in this subpart:

(a) Area served by cable system. The term "area served" by a cable system means an area actually passed by a cable system and which can be connected for a standard connection fee.

(b) Attributable interest. For purposes of determining whether a party has an "attributable interest" as used in this subpart, the definitions contained in the notes to §76.501 shall be used, provided, however that:

(1) The single majority shareholder provisions of Note 2(b) to §76.501 and the limited partner insulation provisions of Note 2(g) to §76.501 shall not apply; and

(2) The provisions of Note 2(a) to §76.501 regarding five (5) percent interests shall include all voting or nonvoting stock or limited partnership equity interests of five (5) percent or more.

(c) Buying groups. The term "buying group" or "agent," for purposes of the definition of a multichannel video programming distributor set forth in paragraph (e) of this section, means an entity representing the interests of more than one entity distributing multichannel video programming that:

(1) Agrees to be financially liable for any fees due pursuant to a satellite cable programming, or satellite broadcast programming, contract which it signs as a contracting party as a representative of its members or whose members, as contracting parties, agree to joint and several liability; and

(2) Agrees to uniform billing and standardized contract provisions for individual members; and

(3) Agrees either collectively or individually on reasonable technical

quality standards for the individual members of the group.

(d) Competing distributors. The term "competing," as used with respect to competing multichannel video programming distributors, means distributors whose actual or proposed service areas overlap.

(e) Multichannel video programming distributor. The term "multichannel video programming distributor" means an entity engaged in the business of making available for purchase, by subscribers or customers, multiple channels of video programming. Such entities include, but are not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, a television receive-only satellite program distributor, and a satellite master antenna television system operator, as well as buying groups or agents of all such entities.

(f) Satellite broadcast programming. The term "satellite broadcast programming" means broadcast video programming when such programming is retransmitted by satellite and the entity retransmitting such programming is not the broadcaster or an entity performing such retransmission on behalf of and with the specific consent of the broadcaster.

(g) Satellite broadcast programming vendor. The term "satellite broadcast programming vendor" means a fixed service satellite carrier that provides service pursuant to section 119 of title 17, United States Code, with respect to satellite broadcast programming.

(h) Satellite cable programming. The term "satellite cable programming" means video programming which is transmitted via satellite and which is primarily intended for direct receipt by cable operators for their retransmission to cable subscribers, except that such term does not include satellite broadcast programming.

(i) Satellite cable programming vendor. The term "satellite cable programming vendor" means a person engaged in the production, creation, or wholesale distribution for sale of satellite cable programming, but does not include a satellite broadcast programming vendor.

(j) Similarly situated. The term "similarly situated" means, for the purposes of evaluating alternative programming contracts offered by a defendant programming vendor, that an alternative multichannel video programming distributor has been identified by the defendant as being more properly compared to the complainant in order to determine whether a violation of §76.1002(b) has occurred. The analysis of whether an alternative multichannel video programming distributor is properly comparable to the complainant includes consideration of, but is not limited to, such factors as whether the alternative multichannel video programming distributor operates within a geographic region proximate to the complainant, has roughly the same number of subscribers as the complainant, and purchases a similar service as the complainant. Such alternative multichannel video programming distributor, however, must use the same distribution technology as the "competing" distributor with whom the complainant seeks to compare itself.

(k) Subdistribution agreement. The term "subdistribution agreement" means an arrangement by which a local cable operator is given the right by a satellite cable programming vendor or satellite broadcast programming vendor to distribute the vendor's programming to competing multichannel video programming distributors.

4. Section 76.1001 is added to Subpart O to read as follows:

§76.1001 Unfair Practices Generally

No cable operator, satellite cable programming vendor in which a cable operator has an attributable interest, or satellite broadcast programming vendor shall engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.

5. Section 76.1002 is added to Subpart O to read as follows:

§76.1002 Specific Unfair Practices Prohibited

(a) Undue or improper influence. No cable operator that has an attributable interest in a satellite cable programming vendor or in a satellite broadcast programming vendor shall unduly or improperly influence the decision of such vendor to sell, or unduly or improperly influence such vendor's prices, terms, and conditions for the sale of, satellite cable programming or satellite broadcast programming to any unaffiliated multichannel video programming distributor.

(b) Discrimination in prices, terms or conditions. No satellite cable programming vendor in which a cable operator has an attributable interest, or satellite broadcast programming vendor, shall discriminate in the prices, terms, and conditions of sale or delivery of satellite cable programming or satellite broadcast programming among or between competing cable systems, competing cable operators, or any competing multichannel video programming distributors. Nothing in this subsection, however, shall preclude:

(1) The imposition of reasonable requirements for creditworthiness, offering of service, and financial stability and standards regarding character and technical quality;

NOTE 1: Vendors are permitted to create a distinct class or classes of service in pricing based on credit considerations or financial stability, although any such distinctions must be applied for reasons other than a multichannel video programming distributor's technology. Vendors are not permitted to manifest factors such as creditworthiness or financial stability in price differentials if such factors are already taken into account through different terms or conditions such as

special credit requirements or payment guarantees.

NOTE 2: Vendors may establish price differentials based on factors related to offering of service, or differences related to the actual service exchanged between the vendor and the distributor, as manifested in standardly applied contract terms based on a distributor's particular characteristics or willingness to provide secondary services that are reflected as a discount or surcharge in the programming service's price. Such factors include, but are not limited to, penetration of programming to subscribers or to particular systems; retail price of programming to the consumer for pay services; amount and type of promotional or advertising services by a distributor; a distributor's purchase of programming in a package or a la carte; channel position; importance of location for non-volume reasons; prepayment discounts; contract duration; date of purchase, especially purchase of service at launch; meeting competition at the distributor level; and other legitimate factors as standardly applied in a technology neutral fashion.

(2) The establishment of different prices, terms, and conditions to take into account actual and reasonable differences in the cost of creation, sale, delivery, or transmission of satellite cable programming or satellite broadcast programming;

NOTE: Vendors may base price differentials, in whole or in part, on differences in the cost of delivering a programming service to particular distributors, such as differences in costs, or additional costs, incurred for advertising expenses, copyright fees, customer service, and signal security. Vendors may base price differentials on cost differences that occur within a given technology as well as between technologies. A price differential for a program service may not be based on a distributor's retail costs in delivering service to subscribers unless the program vendor can demonstrate that subscribers do not or will not benefit from the distributor's cost savings that result from a lower programming price.

(3) The establishment of different prices, terms, and conditions which take into account economies of scale, cost savings, or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor; or

NOTE: Vendors may use volume-related justifications to establish price differentials to the extent that such justifications are made available to similarly situated distributors on a technology-neutral basis. When relying upon standardized volume-related factors that are made available to all multichannel video programming distributors using all technologies, the vendor may be required to demonstrate that such volume discounts are reasonably related to direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor if questions arise about the application of that discount. In such demonstrations, vendors will not be required to provide a strict cost justification for the structure of such standard

volume-related factors, but may also identify non-cost economic benefits related to increased viewership.

(4) Entering into exclusive contracts in areas that are permitted under paragraphs (c)(2) and (c)(4) of this section.

(c) **Exclusive contracts and practices.**

(1) **Unserved areas.** No cable operator shall engage in any practice or activity or enter into any understanding or arrangement, including exclusive contracts, with a satellite cable programming vendor or satellite broadcast programming vendor for satellite cable programming or satellite broadcast programming that prevents a multichannel video programming distributor from obtaining such programming from any satellite cable programming vendor in which a cable operator has an attributable interest, or any satellite broadcast programming vendor in which a cable operator has an attributable interest for distribution to persons in areas not served by a cable operator as of October 5, 1992.

(2) **Served areas.** No cable operator shall enter into any exclusive contracts, or engage in any practice, activity or arrangement tantamount to an exclusive contract, for satellite cable programming or satellite broadcast programming with a satellite cable programming vendor in which a cable operator has an attributable interest or a satellite broadcast programming vendor in which a cable operator has an attributable interest, with respect to areas served by a cable operator, unless the Commission determines in accordance with paragraph (c)(4) of this section that such contract, practice, activity or arrangement is in the public interest.

(3) **Specific arrangements: subdistribution agreements.**

(i) **Unserved areas.** No cable operator shall enter into any subdistribution agreement or arrangement for satellite cable programming or satellite broadcast programming with a satellite cable programming vendor in which a cable operator has an attributable interest or a satellite broadcast programming vendor in which a cable operator has an attributable interest for distribution to persons in areas not served by a cable operator as of October 5, 1992.

(ii) **Served areas.** No cable operator shall enter into any subdistribution agreement or arrangement for satellite cable programming or satellite broadcast programming with a satellite cable programming vendor in which a cable operator has an attributable interest or a satellite broadcast programming vendor in which a cable operator has an attributable interest, with respect to areas served by a cable operator, unless such agreement or arrangement complies with the limitations set forth in paragraph (c)(3)(iii) of this section.

(iii) Limitations on subdistribution agreements in served areas. No cable operator engaged in subdistribution of satellite cable programming or satellite broadcast programming may require a competing multichannel video programming distributor to

(A) Purchase additional or unrelated programming as a condition of such subdistribution; or

(B) Provide access to private property in exchange for access to programming. In addition, a subdistributor may not charge a competing multichannel video programming distributor more for said programming than the satellite cable programming vendor or satellite broadcast programming vendor itself would be permitted to charge. Any cable operator acting as a subdistributor of satellite cable programming or satellite broadcast programming must respond to a request for access to such programming by a competing multichannel video programming distributor within fifteen (15) days of the request. If the request is denied, the competing multichannel video programming distributor must be permitted to negotiate directly with the satellite cable programming vendor or satellite broadcast programming vendor.

(4) Public interest determination. In determining whether an exclusive contract is in the public interest for purposes of paragraph (c)(2) of this section, the Commission will consider each of the following factors with respect to the effect of such contract on the distribution of video programming in areas that are served by a cable operator:

(i) The effect of such exclusive contract on the development of competition in local and national multichannel video programming distribution markets;

(ii) The effect of such exclusive contract on competition from multichannel video programming distribution technologies other than cable;

(iii) The effect of such exclusive contract on the attraction of capital investment in the production and distribution of new satellite cable programming;

(iv) The effect of such exclusive contract on diversity of programming in the multichannel video programming distribution market; and

(v) The duration of the exclusive contract.

(5) Prior Commission approval required. Any cable operator, satellite cable programming vendor in which a cable operator has an attributable interest, or satellite broadcast programming vendor in which a cable operator has an attributable interest seeking to enforce or enter into an exclusive contract in an area served by a cable operator must submit

a "Petition for Exclusivity" to the Commission for approval.

(i) The petition for exclusivity shall contain those portions of the contract relevant to exclusivity, including:

(A) A description of the programming service;

(B) The extent and duration of exclusivity proposed; and

(C) Any other terms or provisions directly related to exclusivity or to any of the criteria set forth in paragraph (c)(4) of this section. The petition for exclusivity shall also include a statement setting forth the petitioner's reasons to support a finding that the contract is in the public interest, addressing each of the five factors set forth in paragraph (c)(4) of this section.

(ii) Any competing multichannel video programming distributor affected by the proposed exclusivity may file an opposition to the petition for exclusivity within thirty (30) days of the date on which the petition is placed on public notice, setting forth its reasons to support a finding that the contract is not in the public interest under the criteria set forth in paragraph (c)(4) of this section. Any such formal opposition must be served on petitioner on the same day on which it is filed with the Commission.

(iii) The petitioner may file a response within ten (10) days of receipt of any formal opposition. The Commission will then approve or deny the petition for exclusivity.

(6) **Sunset provision.** The prohibition of exclusive contracts set forth in paragraph (c)(2) of this section shall cease to be effective on October 5, 2002, unless the Commission finds, during a proceeding to be conducted during the year preceding such date, that said prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming.

(d) **Limitations.**

(1) **Geographic limitations.** Nothing in this section shall require any person who is engaged in the national or regional distribution of video programming to make such programming available in any geographic area beyond which such programming has been authorized or licensed for distribution.

(2) **Applicability to satellite retransmissions.** Nothing in this section shall apply:

(i) To the signal of any broadcast affiliate of a national television network or other television signal that is retransmitted

by satellite but that is not satellite broadcast programming; or

(ii) To any internal satellite communication of any broadcast network or cable network that is not satellite broadcast programming.

(e) Exemptions for prior contracts.

(1) In general. Nothing in this section shall affect any contract that grants exclusive distribution rights to any person with respect to satellite cable programming and that was entered into on or before June 1, 1990, except that the provisions of paragraph (c)(1) of this section shall apply for distribution to persons in areas not served by a cable operator.

(2) Limitation on renewals. A contract that was entered into on or before June 1, 1990, but that was renewed or extended after October 5, 1992, shall not be exempt under paragraph (e)(1) of this section.

(f) Application to existing contracts. All contracts, except those specified in paragraph (e) of this section, related to the provision of satellite cable programming or satellite broadcast programming to any multichannel video programming distributor must be brought into compliance with the requirements specified in this subpart no later than November 15, 1993.

6. Section 76.1003 is added to Subpart O to read as follows:

§76.1003 Adjudicatory Proceedings

Any competing multichannel video programming distributor aggrieved by conduct that it alleges to constitute a violation of the regulations set forth in this subpart may commence an adjudicatory proceeding at the Commission.

(a) Notice required. Any aggrieved multichannel video programming distributor intending to file a complaint under this section must first notify the potential defendant cable operator, and/or the potential defendant satellite cable programming vendor or satellite broadcast programming vendor, that it intends to file a complaint with the Commission based on actions alleged to violate one or more of the provisions contained in §§76.1001 or 76.1002. The notice must be sufficiently detailed so that its recipient(s) can determine the specific nature of the potential complaint. The potential complainant must allow a minimum of ten (10) days for the potential defendant(s) to respond before filing a complaint with the Commission.

(b) General pleading requirements.

Program access complaint proceedings are generally resolved on a written record consisting of a complaint, answer and reply, but may also include other written submissions such as briefs and written interrogatories. All written submissions, both substantive and procedural, must conform to the following standards:

(1) Pleadings must be clear, concise, and explicit. All matters concerning a claim, defense or requested remedy, should be pleaded fully and with specificity.

(2) Pleadings must contain facts which, if true, are sufficient to constitute a violation of the Act or Commission order or regulation, or a defense to such alleged violation.

(3) Facts must be supported by relevant documentation or affidavit.

(4) Legal arguments must be supported by appropriate judicial, Commission, or statutory authority.

(5) Opposing authorities must be distinguished.

(6) Copies must be provided of all non-Commission authorities relied upon which are not routinely available in national reporting systems, such as unpublished decisions or slip opinions of courts or administrative agencies.

(7) Parties are responsible for the continuing accuracy and completeness of all information and supporting authority furnished in a pending complaint proceeding. Information submitted, as well as relevant legal authorities, must be current and updated as necessary and in a timely manner at any time before a decision is rendered on the merits of the complaint.

(c) **Complaint.**

(1) A program access complaint shall contain:

(i) The name of the complainant and each defendant;

(ii) The type of multichannel video programming distributor that describes complainant, the address and telephone number of the complainant, whether the defendant is a cable operator, satellite broadcast programming vendor or satellite cable programming vendor (describing each defendant), and the address and telephone number of each defendant;

(iii) The name, address and telephone number of complainant's attorney, if represented by counsel;

(iv) Citation to the section of the Communications Act and/or Commission regulation or order alleged to have been violated;

(v) A complete statement of facts, which, if proven true, would constitute such a violation;

(vi) Any evidence that supports the truth or accuracy of the

alleged facts;

(vii) Evidence that supports complainant's belief that the defendant, where necessary, meets the attribution standards for application of the program access requirements;

(viii) Evidence that the complainant competes with the defendant cable operator, or with a multichannel video programming distributor that is a customer of the defendant satellite cable programming or satellite broadcast programming vendor;

(ix) In complaints alleging discrimination, documentary evidence such as a rate card or a programming contract that demonstrates a differential in price, terms or conditions between complainant and a competing multichannel video programming distributor or, if no programming contract or rate card is submitted with the complaint, an affidavit signed by an officer of complainant alleging that a differential in price, terms or conditions exists, a description of the nature and extent (if known or reasonably estimated by the complainant) of the differential, together with a statement that defendant refused to provide any further specific comparative information;

(x) If a programming contract or a rate card is submitted with the complaint in support of the alleged violation, specific references to the relevant provisions therein;

(xi) In complaints alleging exclusivity violations:

(A) The identity of both the programmer and cable operator who are parties to the alleged prohibited agreement,

(B) Evidence that complainant can or does serve the area specified in the complaint, and

(C) Evidence that the complainant has requested to purchase the relevant programming and has been refused or unanswered;

(xii) In complaints alleging a violation of §76.1001, evidence demonstrating that the behavior complained of has harmed complainant; and

(xiii) The specific relief sought.

(2) Every complaint alleging a violation of the program access requirements shall be accompanied by a sworn affidavit signed by an authorized officer or agent of the complainant. This affidavit shall contain a statement that the affiant has read the complaint and that to the best of the affiant's knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted under Commission regulations and policies or is a good faith argument for the extension, modification or reversal of such regulations or policies,

and it is not interposed for any improper purpose. If the complaint is signed in violation of this rule, the Commission upon motion or its own initiative shall impose upon the complainant an appropriate sanction.

(3) The following format may be used in cases to which it is applicable, with such modifications as the circumstances may render necessary:

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the matter of

Complainant,

v.

Defendant.
File No. (To be inserted by the Commission)

[Insert Subject/Nature of Issue:
Discrimination; Exclusivity; Undue Influence;
Unfair Practice]
Program Access Complaint

TO: The Commission.

The complainant (here insert full name of complainant, and if a corporation, the corporate title of such complainant)

1. (Here state the complainant's method of multichannel video program distribution; post office address, and telephone number of the complainant).
2. (Here insert the name, whether a cable operator, satellite broadcast programming vendor or satellite cable programming vendor, address and telephone number of each defendant).
3. (Here insert fully and clearly the specific act or thing complained of, together with such facts as are necessary to give full understanding of the matter, including relevant legal and documentary support).

Wherefore, complainant asks (here state specifically the relief desired).

(Date)
(Name of complainant)
(Name, address, and telephone number of attorney, if any)

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(4) The complaint must be accompanied by appropriate evidence demonstrating that the required notification pursuant to paragraph (a) of this section has been made.

(d) Answer.

(1) Any cable operator, satellite cable programming vendor or satellite broadcast programming vendor upon which a program access complaint is served under this section shall answer within thirty (30) days of service of the complaint, unless otherwise directed by the Commission.

(2) The answer shall advise the parties and the Commission fully and completely of the nature of any and all defenses, and shall respond specifically to all material allegations of the complaint. Collateral or immaterial issues shall be avoided in answers and every effort should be made to narrow the issues. Any defendant failing to file and serve an answer within the time and in the manner prescribed by these rules may be deemed in default and an order may be entered against defendant in accordance with the allegations contained in the complaint.

(3) The answer shall state concisely any and all defenses to each claim asserted and shall admit or deny the averments on which the adverse party relies. If the defendant is without knowledge or information sufficient to form a belief as to the truth of an averment, the defendant shall so state and this has the effect of a denial. When a defendant intends in good faith to deny only part of an averment, the answer shall specify so much of it as is true and shall deny only the remainder. The defendant may make its denials as specific denials of designated averments or paragraphs, or may generally deny all the averments except such designated averments or paragraphs as the defendant expressly admits. When the defendant intends to controvert all averments, the defendant may do so by general denial.

(4) Averments in a complaint are deemed to be admitted when not denied in the answer.

(5) An answer to an exclusivity complaint shall provide the defendant's reasons for refusing to sell the subject programming to the complainant. In addition, the defendant may submit to the Commission its programming contracts covering the area specified in the complaint with its answer to refute allegations concerning the existence of an impermissible exclusive contract. If there are no contracts governing the specified area, the defendant shall so certify in its answer. Any contracts submitted pursuant to this provision may be protected as proprietary pursuant to paragraph (h) of this section.

(6) An answer to a discrimination complaint shall state the reasons for any differential in prices, terms or conditions between the complainant and its competitor, and shall specify the particular justification set forth in §76.1002(b) relied upon in support of the differential.

(i) When responding to allegations concerning price discrimination, except in cases in which the alleged price differential is de minimis (less than or equal to five cents per subscriber or five percent, whichever is greater), the defendant shall provide documentary evidence to support any argument that the magnitude of the differential is not discriminatory.

(ii) In cases involving a price differential of less than or equal to five cents per subscriber or five percent, whichever is greater, the answer shall identify the differential as de minimis and state that the defendant is therefore not required to justify the magnitude of the differential.

(iii) If the defendant believes that the complainant and its competitor are not sufficiently similar, the answer shall set forth the reasons supporting this conclusion, and the defendant may submit an alternative contract for comparison with a similarly situated multichannel video programming distributor that uses the same distribution technology as the competitor selected for comparison by the complainant. The answer shall state the defendant's reasons for any differential between the prices, terms and conditions between the complainant and such similarly situated distributor, and shall specify the particular justifications in §76.1002(b) relied upon in support of the differential. The defendant shall also provide with its answer written documentary evidence to support its justification of the magnitude of any price differential between the complainant and such similarly situated distributor that is not de minimus.

(iv) Any documents or contracts submitted pursuant to this subparagraph may be protected as proprietary pursuant to paragraph (h) of this section.

(7) An answer to a complaint alleging an unreasonable refusal to sell programming shall state the defendant's reasons for refusing to sell to the complainant, or for refusing to sell to the complainant on the same terms and conditions as complainant's competitor, and shall specify why the defendant's actions are not discriminatory.

(e) Reply.

Within twenty (20) days after service of an answer, the complainant may file and serve a reply which shall be responsive to matters contained in the answer and shall not contain new matters. Failure to reply will not be deemed an admission of any allegations contained in the answer, except with respect to any affirmative defenses set forth therein. Replies containing information claimed by defendant to be proprietary under paragraph (h) of this section shall be submitted to the Commission in confidence pursuant to the requirements of Section 0.459 of this chapter and clearly marked "Not for Public Inspection." An edited version removing all proprietary data shall be filed with the Commission for inclusion in the public file within five (5)

days from the date the unedited reply is submitted, and shall be served on the defendant.

(f) Motions.

Except as provided in this section, or upon a showing of extraordinary circumstances, additional motions or pleadings by any party will not be accepted.

(g) Discovery.

(1) The Commission staff may in its discretion order discovery limited to the issues specified by the Commission. Such discovery may include answers to written interrogatories or document production.

(2) The Commission staff may in its discretion direct the parties to submit discovery proposals, together with a memorandum in support of the discovery requested. Such discovery requests may include answers to written interrogatories, document production or depositions. The Commission staff will then hold a status conference with the parties, pursuant to paragraph (j) of this section, to determine the scope of discovery. If the Commission staff determines that extensive discovery is required or that depositions are warranted, the staff will advise the parties that the proceeding will be referred to an administrative law judge in accordance with paragraph (m) of this section.

(h) Confidentiality of proprietary information.

(1) Any materials generated or provided by a party in the course of adjudicating a program access complaint under this provision may be designated as proprietary by that party if the party believes in good faith that the materials fall within an exemption to disclosure contained in the Freedom of Information Act (FOIA), 5 U.S.C. §552(b). Any party asserting confidentiality for such materials shall so indicate by clearly marking each page, or portion thereof, for which a proprietary desigantion is claimed. If a proprietary designation is challenged, the party claiming confidentiality will have the burden of demonstrating, by a preponderance of the evidence, that the material designated as proprietary falls under the standards for nondisclosure enunciated in the FOIA.

(2) Materials marked as proprietary may be disclosed solely to the following persons, only for use in prosecuting or defending a party to the complaint action, and only to the extent necessary to assist in the prosecution or defense of the case:

(i) Counsel of record representing the parties in the complaint action and any support personnel employed by such attorneys;

(ii) Officers or employees of the opposing party who are named by the opposing party as being directly involved in the prosecution or

defense of the case;

(iii) Consultants or expert witnesses retained by the parties;

(iv) The Commission and its staff; and

(v) Court reporters and stenographers in accordance with the terms and conditions of this section.

(3) The persons designated in paragraph (h)(2) of this section shall not disclose information designated as proprietary to any person who is not authorized under this section to receive such information, and shall not use the information in any activity or function other than the prosecution or defense in the case before the Commission. Each individual who is provided access to the information by the opposing party shall sign a notarized statement affirmatively stating, or shall certify under penalty of perjury, that the individual has personally reviewed the Commission's rules and understands the limitations they impose on the signing party.

(4) No copies of materials marked proprietary may be made except copies to be used by persons designated in paragraph (h)(2) of this section. Each party shall maintain a log recording the number of copies made of all proprietary material and the persons to whom the copies have been provided.

(5) Upon termination of the complaint proceeding, including all appeals and petitions, all originals and reproductions of any proprietary materials, along with the log recording persons who received copies of such materials, shall be provided to the producing party. In addition, upon final termination of the complaint proceeding, any notes or other work product derived in whole or in part from the proprietary materials of an opposing or third party shall be destroyed.

(i) Other required written submissions.

(1) The Commission may, in its discretion, require the parties to file briefs summarizing the facts and issues presented in the pleadings and other record evidence. These briefs shall contain the findings of fact and conclusions of law which that party is urging the Commission to adopt, with specific citations to the record, and supported by relevant authority and analysis.

(2) The Commission may require the parties to submit any additional information it deems appropriate for a full, fair, and expeditious resolution of the proceeding, including copies of all contracts and documents reflecting arrangements and understandings alleged to violate the program access requirements set forth in the Communications Act and sections 76.1001 and 76.1002, as well as affidavits and exhibits.

(3) Any briefs submitted shall be filed concurrently by both the complainant and defendant at such time as is designated by the staff.

Such briefs shall not exceed fifty (50) pages.

(4) Reply briefs may be submitted by either party within twenty (20) days from the date initial briefs are due. Reply briefs shall not exceed thirty (30) pages.

(5) Briefs containing information which is claimed by an opposing or third party to be proprietary under paragraph (h) of this section shall be submitted to the Commission in confidence pursuant to the requirements of §0.459 of this chapter, and shall be clearly marked "Not for Public Inspection." An edited version removing all proprietary data shall be filed with the Commission for inclusion in the public file within five (5) days from the date the unedited version is submitted and served on opposing parties.

(j) **Status conference.**

(1) In any program access complaint proceeding, the Commission staff may in its discretion direct the attorneys and/or the parties to appear for a conference to consider:

(i) Simplification or narrowing of the issues;

(ii) The necessity for or desirability of amendments to the pleadings, additional pleadings, or other evidentiary submissions;

(iii) Obtaining admissions of fact or stipulations between the parties as to any or all of the matters in controversy;

(iv) Settlement of the matters in controversy by agreement of the parties;

(v) The necessity for and extent of discovery, including objections to interrogatories or requests for written documents;

(vi) The need and schedule for filing briefs, and the date for any further conferences; and

(vii) Such other matters that may aid in the disposition of the complaint.

(2) Any party may request that a conference be held at any time after the complaint has been filed.

(3) Conferences will be scheduled by the Commission at such time and place as it may designate, to be conducted in person or by telephone conference call.

(4) The failure of any attorney or party, following reasonable notice, to appear at a scheduled conference will be deemed a waiver and will not preclude the Commission from conferring with those parties or counsel

present.

(5) During a status conference, the Commission staff may issue oral rulings pertaining to a variety of interlocutory matters relevant to the conduct of a program access complaint proceeding including, inter alia, procedural matters, discovery, and the submission of briefs or other evidentiary materials. These rulings will be promptly memorialized in writing and served on the parties. When such rulings require a party to take affirmative action not subject to deadlines established by another provision of this subpart, such action will be required within ten (10) days from the date of the written memorialization unless otherwise directed by the staff.

(k) Specifications as to pleadings, briefs, and other documents; subscriptions.

(1) All papers filed in a program access complaint proceeding must be drawn in conformity with the requirements of §§1.49 and 1.50 of this chapter.

(2) All averments of claims or defenses in complaints and answers shall be made in numbered paragraphs. The contents of each paragraph shall be limited as far as practicable to a statement of a single set of circumstances. Each claim founded on a separate transaction or occurrence and each affirmative defense shall be separately stated to facilitate the clear presentation of the matters set forth.

(3) The original of all pleadings and submissions by any party shall be signed by that party, or by the party's attorney. Complaints must be signed by the complainant. The signing party shall state his or her address and telephone number and the date on which the document was signed. Copies should be conformed to the original. Except when otherwise specifically provided by rule or statute, pleadings need not be verified. The signature of an attorney or party shall be a certificate that the attorney or party has read the pleading, motion, or other paper; that to the best of his or her knowledge, information and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and that it is not interposed for any improper purpose. If any pleading or other submission is signed in violation of this provision, the Commission shall upon motion or upon its own initiative impose upon the party an appropriate sanction. Where the pleading or submission is signed by counsel, the provisions of §§1.52 and 1.24 of this chapter shall also apply.

(l) Copies; service.

(1) The complainant shall file an original plus three copies of the complaint with the Commission. However, if the complaint is addressed against multiple defendants, complainant shall provide three additional copies of the complaint for each additional defendant.

(2) An original plus two copies shall be filed of all pleadings and documents other than the complaint.

(3) The complainant shall serve the complaint on each defendant at the same time that it is filed at the Commission.

(4) All subsequent pleadings and briefs, as well as all letters, documents or other written submissions, shall be served by the filing party on all other parties to the proceeding, together with proof of such service in accordance with the requirements of §1.47 of this chapter.

(5) The parties to any program access complaint proceeding brought pursuant to this section may be required to file additional copies of any or all papers filed in the proceeding.

(m) Referral to administrative law judge.

(1) After reviewing the complaint, answer and reply, and at any stage of the proceeding thereafter, the Commission staff may, in its discretion, designate any program access complaint proceeding for an adjudicatory hearing before an administrative law judge.

(2) Before designation for hearing, the staff shall notify, either orally or in writing, the parties to the proceeding of its intent to so designate, and the parties shall be given a period of ten (10) days to elect to resolve the dispute through alternative dispute resolution procedures, or to proceed with an adjudicatory hearing. Such election shall be submitted in writing to the Commission.

(3) Unless otherwise directed by the Commission, or upon motion by the Mass Media Bureau Chief, the Mass Media Bureau Chief shall not be deemed to be a party to a program access complaint proceeding designated for a hearing before an administrative law judge pursuant to this paragraph.

(n) Petitions for reconsideration.

Petitions for reconsideration of interlocutory actions by the Commission's staff or by an administrative law judge will not be entertained. Petitions for reconsideration of a decision on the merits made by the Commission's staff should be filed in accordance with §§1.104-1.106 of this chapter.

(o) Interlocutory review.

(1) Except as provided below, no party may seek review of interlocutory rulings until a decision on the merits has been issued by the staff or administrative law judge.

(2) Rulings listed in this paragraph are reviewable as a matter of right. An application for review of such ruling may not be deferred and

raised as an exception to a decision on the merits.

(i) If the staff's ruling denies or terminates the right of any person to participate as a party to the proceeding, such person, as a matter of right, may file an application for review of that ruling.

(ii) If the staff's ruling requires production of documents or other written evidence, over objection based on a claim of privilege, the ruling on the claim of privilege is reviewable as a matter of right.

(iii) If the staff's ruling denies a motion to disqualify a staff person from participating in the proceeding, the ruling is reviewable as a matter of right.

(p) Expedited review.

(1) Any party to a program access complaint proceeding aggrieved by any decision on the merits issued by the staff pursuant to delegated authority may file an application for review by the Commission in accordance with §1.115 of this chapter.

(2) Any party to a program access complaint proceeding aggrieved by any decision on the merits by an administrative law judge may file an appeal of the decision directly with the Commission, in accordance with §1.276(a) and §§1.277(a)-(c) of this chapter, except that unless a stay is granted by the Commission, the decision by the administrative law judge will become effective upon release and will remain in effect pending appeal.

(q) Frivolous complaints.

It shall be unlawful for any party to file a frivolous complaint with the Commission alleging any violation of this subpart. Any violation of this paragraph shall constitute an abuse of process subject to appropriate sanctions.

(r) Statute of limitations.

Any complaint filed pursuant to this subsection must be filed within one year of the date on which one of the following events occurs:

(1) The satellite cable programming or satellite broadcast programming vendor enters into a contract with the complainant that the complainant alleges to violate one or more of the rules contained in this subpart; or

(2) The satellite cable programming or satellite broadcast programming vendor offers to sell programming to the complainant pursuant to terms that the complainant alleges to violate one or more of the rules contained in this subpart; or

(3) The complainant has notified a cable operator, or a satellite cable programming vendor or a satellite broadcast programming vendor that it intends to file a complaint with the Commission based on a request to purchase or negotiate to purchase satellite cable programming or satellite broadcast programming, or a request to amend an existing contract pertaining to such programming pursuant to §76.1002(f) that has been denied or unacknowledged, allegedly in violation of one or more of the rules contained in this subpart.

(s) Remedies for violations.

(1) **Remedies authorized.** Upon completion of such adjudicatory proceeding, the Commission shall order appropriate remedies, including, if necessary, the establishment of prices, terms, and conditions for the sale of programming to the aggrieved multichannel video programming distributor. Such order shall set forth a timetable for compliance, and shall become effective upon release.

(2) **Additional sanctions.** The remedies provided in paragraph (s)(1) of this section are in addition to and not in lieu of the sanctions available under title V or any other provision of the Communications Act.

6. Sections 76.1004 through 76.1010 are reserved.

April 1, 1993

SEPARATE STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

RE: Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992 -- Program Access Provisions [MM Docket No. 92-265]

This First Report and Order adopts rules to implement program access requirements under Section 19 [Section 628] of the 1992 Cable Act. [Cable Act] Based on the analysis of the statutory language and the legislative history of this section of the Cable Act, I believe the rules we adopt today comport with the mandate for program access under the Cable Act. As a result of these rules, competing multichannel video program distributors [MVPD], such as wireless cable, SMATV, Direct Broadcast Satellite, and C-Band Home Satellite Dish program distributors, will be able to complain to the FCC if they find discriminatory price differences or discriminatory program distribution practices by vertically integrated cable programmers or satellite broadcast programming vendors [cable programmers]. Consistent with the intent of Section 628(c) of the Cable Act, an MVPD is not required to show harm prior to filing a price discrimination or non-price discrimination complaint with respect to the prohibitions specified under that section in our rules. In such cases, harm is presumed unless proven otherwise by a cable programmer in response to a specific discrimination complaint. Consistent with section 628(c) of the Cable Act, cable programmers will be permitted to respond to MVPD complaints and justify price differences based on costs, legitimate economic benefits attributable to the number of subscribers, creditworthiness, offering of service factors, or any combination of these categories. Cable programmers will be permitted to show how their prices to MVPD operators compare with those charged to similarly situated distributors.[1] In all bona fide [i.e. non-frivolous] cases of discrimination alleged under section 628(c) of the Cable Act, cable programmers will have the burden of proving that their pricing practices are not discriminatory. Commission staff will review these complaints under the procedures outlined in this Order, and will require further discovery, or refer the case to hearing before an Administrative

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[1] Similarly situated distributors are those that operate in the same geographic region, have approximately the same number of subscribers, and have purchased a similar program service. As we review initial complaints, I believe this provision of the rules will require a cable programmer to justify a price difference between an MVPD and a similarly situated cable operator [i.e. number of subscribers and similar program service] in the relevant geographic region.

Law Judge if the facts are too complex.

I write separately to express my views about several aspects of our program access rules. First, due to the low threshold for filing a bona fide Section 628(c) discrimination complaint under our rules, I am concerned that the Commission could receive a "flood" of frivolous complaints. The increase in staff costs and administrative burden imposed by this and other sections of the Cable Act are likely to be severe, even if all complaints are bona fide. Thus, I will closely scrutinize any complaints the staff dismisses as frivolous, and will support severe sanctions in such cases.[2]

Second, I am concerned that the attribution limits we adopt today may unduly limit the ability of minority programmers to launch additional services. The Cable Act is concerned about diversity of programming. I believe such concerns could encompass both diversity of program distribution as well as diversity of program sources.[3] Thus, where a minority programmer is a single majority stockholder, I would support efforts on reconsideration to consider that as an additional factor in our

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[2] Frivolous complaints filed by MVPDs will be sanctioned by the Commission. I anticipate that the complaint process in this Order could result in a high volume of complaints to the Commission. Thus, I am very concerned that the FCC closely review complaints to ensure they are not frivolous. In this regard, I would hope that MVPDs and cable programmers will attempt to negotiate many of their differences in the marketplace before filing a complaint with the FCC. Once a complaint is filed under these rules, the FCC will require cable programmers to provide the information necessary to refute any bona fide complaints. If discovery is required to obtain the necessary information, I will not hesitate to support such requirements. Thus, cable programmers should be on notice that, where feasible, they should attempt to provide information necessary to justify price differences before a bona fide discrimination complaint arrives at the FCC.

[3] Section 628 addresses diversity of programming concerns with respect to the multichannel video programming market in section (a) and section (d) [exclusive contract public interest factors]. Further, Section 9(a) of the Cable Act concerning commercial leased access contains specific language addressing concerns with respect to the delivery of "diverse sources of video programming" to the public. Section 9(c) states that qualified minority programmers, regardless of their affiliation with a cable operator, may be carried to satisfy up to 1/3 of the operator's leased access requirements. Thus, in order to encourage ongoing diversity in program sources, I believe the Commission could equitably consider applying the broadcast attribution standard for vertically integrated minority programmers who are single majority stockholders.

attribution standards.[4] I also would consider viewing minority-owned program [single majority stockholder] exclusivity arrangements as a legitimate public interest factor that could be allowed by the Commission for a limited start-up period in new markets. Cable programmers have provided capital for new minority program services over the past decade. I believe such services enhance the diversity and quality of program viewing for the public and should continue to be encouraged within the limits of section 628.

Finally, I am concerned that cable programmers receive sufficient time to renegotiate contracts and adjust to these new rules in the marketplace. Thus, I support allowing programmers 120 days after the effective date of this Order to adjust to these new rules.

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[4] The legislative history of this provision [Cf Senate Report at 78], allows the FCC to use current attribution rules applicable to mass media holdings, or other criteria deemed appropriate. Thus, with respect to nurturing the continued growth of minority programming, I believe the Commission could consider applying the single majority stockholder rule from our broadcast attribution standard. However, consistent with Section 628 of the Act, I remain concerned that price discrimination practices would not be protected by applying such an attribution standard. Thus, I believe further information on pricing practices also would need to be considered before a minority programmer could qualify for this attribution standard.

*U.S. Government Printing Office: 1993 — 342-145/80018